117

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 288.110

L. M. MARSHALL, PLAINTIFF IN ERROR,

vs.

STEPHEN HUBBARD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 13, 1884.

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INDEX.

	Original.	Print.
Caption	1	1
Order to docket cause, &c	1	1
Transcript from circuit court of Brown county	3	1
Summons and service	3	1
Complaint	4	2
Answer	8	4
Amended answer	16	8
Reply to counter-claim	20	10
Jury	22	11
Verdict	23	11
Order overruling motion for new trial	23	11
Judgment	24	12
Notice of appeal	25	12
Bond on appeal	25	12
Clerk's certificate	27	13
Opinion of supreme court of Wisconsin	27	13
Judgment of supreme court of Wisconsin	36	18
Notice of motion to remove to C. C. U. S.	38	19
Petition for removal to C. C. U. S.	40	20
Bond for removal to C. C. U. S.	42	21
Order of removal to C. C. U. S.	44	22
Clerk's certificate	45	22

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	Original.	Print.
Order to file amended answer	47	23
Amended answer	47	23
Hearing	52	25
Order to amend amended answer	53	25
Amendment to amended answer	54	26
Verdict	55	27
Motion for new trial	56	27
Judgment	56	27
Order that judgment be stayed	57	27
Hearing on motion for new trial	58	28
Order overruling motion for new trial, &c	58	28
Bill of exceptions	59	29
Testimony of L. M. Marshall	59	29
James Marshall	65	32
L. M. Marshall (resumed)	72	35
Nicholas Gillen	92	44
Hugh Monroe	93	45
Edward Kurtz	99	48
Stephen Hubbard	99	48
Exhibit No. 1—Deed of Stephen Hubbard to L. M. Marshall, May 23, 1874	137	66
2—Agreement between Stephen Hubbard and Nicholas Gillen and Hugh Monroe, April 26, 1873	139	67
3—Receipt of L. M. Marshall to Nicholas Gillen and Hugh Monroe, April 19, 1876	144	70
4—Deed of Nicholas Gillen and Hugh Monroe to L. M. Marshall, April 19, 1876	145	70
Supersedeas bond	147	71
Order for writ of error, &c	149	72
Opinion	150	72
Clerk's certificate	169	79
Writ of error	170	79
Citation and service	171	80

1 UNITED STATES OF AMERICA, *Eastern District of Wisconsin:*

Circuit Court of the United States for the Eastern District of Wisconsin.

At a stated term of the circuit court of the United States for the eastern district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district, on the first Monday (being the second day) of January, A. D. 1882.

Present: The Honorable Charles E. Dyer, district judge, presiding. Also present Fink, marshal, and Edward Kurtz, clerk.

Among other the following proceedings were had, to wit:

STEPHEN HUBBARD
v.
L. M. MARSHALL. } At Law.

Be it remembered that heretofore, to wit, at a stated meeting of said court begun and held at the city of Milwaukee on the first Monday (being the third day) of January, A. D. 1881, and on the eighty-second day thereof, to wit, on the second day of May, A. D. 1881, present, the Hon. Charles E. Dyer, district judge, presiding, the following proceedings were had, to wit:

Order Docketing Case from State C't.

STEPHEN HUBBARD
v.
L. M. MARSHALL. } At Law.

2 This day came the plaintiff, by his counsel, Mr. J. D. Markham, and presented to the court copies of the process, pleadings, and proceedings in this cause, certified from the circuit court for Brown county, in this district, pursuant to an order of said court removing said cause to this court, including copies of the petition and bond of said plaintiff required by law for such removal, and said order of removal.

Whereupon it is ordered by the court that the said copies be filed, and that the cause be entered on the law docket of this court, and be proceeded with in the same manner as if it had been commenced her by original process.

Which copies are as follows:

3 *Summons.*

In Circuit Court, Brown County.

STEPHEN HUBBARD *vs.* L. M. MARSHALL.

To the above named defendant:

You are hereby summoned and required to answer the complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to said complaint on the subscriber, at his office in the city and county of Manitowoc, Wis., within twenty

days after the service of this summons and complaint upon you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid the plaintiff in this action will take judgment against you for the sum of four thousand one hundred and fifty-two dollars and thirty-nine cents ($4,152.39), with interest thereupon from the first day of January, 1876, at ten per cent. per annum, besides the costs of this action.

Dated at Manitowoc, Wis., this —— day of January, 1876.

J. D. MARKHAM,
Plaintiff's Att'y, residing at Manitwoc, Wis.

STATE OF WISCONSIN, } ss:
Brown County, }

I hereby certify that I personally served the within summons and annexed complaint upon L. M. Marshall, the within-named defendant, by showing him the original summons and complaint,
4 and delivering to and leaving with him true copies thereof, at the city of Green Bay, in the county of Brown, on the 3rd day of February, A. D. 1877.

DANIEL LEE,
Sheriff of Brown County, Wis.

Fees, $2.50.

Filed Sept. 19, 1879. EDM. P. BOLAND, *Clerk.*

Complaint.

In the Circuit Court, Brown County.

STEPHEN HUBBARD *vs.* L. M. MARSHALL.

The plaintiff in the above-entitled action respectively shows unto this court that on the 23rd day of May, A. D. 1874, the said defendant, L. M. Marshall, became, and was, justly indebted to the said plaintiff in the sum of five thousand and thirty-five dollars and sixteen cents (5,035.16), and in consideration thereof, and for the purpose of securing the payment of that debt, the said defendant, L. M. Marshall, duly executed, under his hand, and delivered to said plaintiff, Stephen Hubbard, his two certain promissory notes in writing, bearing date on the said 23rd day of May, A. D. 1874, in and by which, in one of said notes, the said defendant, L. M. Marshall, promised, one year after the date thereof, for value received, to pay to said plaintiff, Stephen Hubbard, or order, the sum of two thousand five hundred and seventeen dollars and fifty-eight cents (2,517.58), at the First National Bank of Green Bay,
5 Wis., with interest thereupon at and after the rate of ten per cent. per annum, which said certain promissory note is in the words and figures following, viz:

"$2,517.58. GREEN BAY, WIS., *May 23rd*, 1874.

"For value received, one year after date I promise to pay to Stephen Hubbard, or order, two thousand five hundred seventeen

& $\frac{58}{100}$ dollars, at the First National Bank in Green Bay, with interest at the rate of ten per cent per annum until paid.

(Signed) L. M. MARSHALL.

That said plaintiff, Stephen Hubbard, is now the lawful owner and holder of said note, and that although the said plaintiff, Stephen Hubbard, has duly demanded and requested the said defendant, L. M. Marshall, to pay the same, the said defendant hath hitherto and still doth refuse and neglect to pay the same, or any part thereof, except the sum of three hundred and sixty-five dollars and eleven cents paid and endorsed on the back of said note on the 5th day of November, A. D. 1875. That there still remains due and unpaid on said note the sum of two thousand five hundred and fifty-nine dollars and fifty-four cents (2,559.54), with interest thereupon at the rate of ten per cent. per annum from the 1st day of January, A. D. 1876. That on the other of said note so executed and delivered to said plaintiff as aforesaid the said defendant, L. M.
6 Marshall, promised, eighteen months after the date thereof, for value received, to pay the said plaintiff, Stephen Hubbard, or order, the further sum of two thousand five hundred and seventeen dollars and fifty-eight cents, at the First National Bank of Green Bay, with interest thereupon at the rate of ten per cent. per annum until paid, which said certain promissory note is in the words and figures following, viz:

"$2,517.58. GREEN BAY, WIS., *May 23rd*, 1874.

"For value received, eighteen months after date I promise to pay to Stephen Hubbard, or order, two thousand five hundred seventeen & $\frac{58}{100}$ dollars, at the First National Bank in Green Bay, with interest at the rate of ter per cent per annum until paid.

(Signed) "L. M. MARSHALL."

That said plaintiff, Stephen Hubbard, is now the lawful owner and holder of said note, and that although the said plaintiff has duly demanded and requested the said defendant, L. M. Marshall, to pay the same, the said defendant hath hitherto and still does refuse and neglect to pay the same, or any part thereof, except the sum of three hundred and seventy-seven dollars and sixty-three cents paid and endorsed on the back of said note on the 25th day of November, A. D. 1875, and the further sum of nine hundred
7 and forty-five dollars and seventy-one cents, paid and endorsed on the back of said note on the 1st day of January, A. D. 1876. That there still remains due and unpaid on said note the sum of one thousand five hundred and ninety-two dollars and eighty-five cents, with interest thereupon at the rate of ten per cent. per annum from the 1st day of January, A. D. 1876.

That there is now justly due and owing said plaintiff from said def't on both said notes, together, the sum of four thousand one hundred and fifty-two dollars and thirty-nine cents, with interest thereon at the rate of ten per cent. per annum from the 1st day of January, 1876. Wherefore said plaintiff demands judgment against

said defendant for the sum of four thousand one hundred and fifty-two dollars and thirty-nine cents, with interest thereon at the rate of ten per cent. per annum from the 1st day of January, A. D. 1876, besides the costs of this action.

J. D. MARKHAM,
Plaintiff's Att'y.

STATE OF WISCONSIN, } ss:
County of Manitowoc, }

J. D. Markham, being duly sworn, says: That he is the plaintiff's att'y in the above-entitled action; that he has read the foregoing complaint, and knows the contents thereof, and that the same is true, of his own knowledge, except as to those matters therein stated to be upon information and belief, and as to those matters he
8 believes it to be true. Deponent further saith that the reason the verification of said complaint is not made by the plaintiff herein is that said plaintiff is not a resident of the State of Wisconsin, but is a resident of the State of Texas, and that the said plaintiff is not now within the county of Manitowoc, Wis., where his said attorney resides. That deponent's knowledge is derived from the plaintiff's & def't. That deponent has the possession of the two promissory notes mentioned in the foregoing complaint, and information given deponent by plaintiff, in letters received by deponent from said plaintiff, also from admissions made to this deponent by said defendant, by way of letter written by def't to this deponent.

J. D. MARKHAM.

Subscribed and sworn to before me, this 30th day of January, A. D. 1877.

FRED. HARRIS,
Notary Public, Manitowoc County, Wisconsin.

Filed Sept. 19, 1879. EDM. P. BOLAND, *Clerk.*

Answer.

STATE OF WISCONSIN:

In Circuit Court for Brown County.

STEPHEN HUBBARD, Pl'ff, *vs.* L. M. MARSHALL, Def't.

The defendant in the above-entitled action, for answer to the plaintiff's complaint herein, respectively shows to the court
9 and alleges:

I. The defendant denies that on the 23d day of May, 1874, or that he at any other time became or was in any manner indebted to the plaintiff in the sum of five thousand and thirty-five dollars and sixteen cents ($5,035.16), or in any other sum of money whatever.

II. The defendant admits that he made, executed, and delivered the two promissory notes to the said plaintiff, as described in his said complaint, and admits the several payments as endorsed thereon, and that plaintiff is the holder of said notes.

III. And defendant alleges that both of the said alleged promissory notes was made, executed, and delivered by the defendant to the plaintiff in consideration of the sale and assignment to him by Nicholas Gillin & Hugh Monroe of a certain instrument in writing commonly called an agreement or contract, made and entered into by and between the said plaintiff and Nicholas Gillen and Hugh Monroe, bearing date April 6th, 1873, a copy of which agreement and contract is hereto annexed, marked Schedule "A," and hereby made a part of this answer; that said assignment or agreement was duly made, and the said notes made and delivered by and with the express understanding and agreement, by and between the said plaintiff and this defendant, the plaintiff guarantee- that there was then standing, being growing in and upon the real estate in said agreement or contract as aforesaid described, at the least, three million feet of good, sound, merchantable pine timber, fit to be manufactured into lumber and shingles, and the plaintiff then and there covenanted and agreed that there was the full amount of three million feet of pine timber on said land and premises as aforesaid; and if there was not that amount of timber on said premises as aforesaid, then this defendant was only to pay in proportion to the amount of timber that there was in fact upon said real estate, and for no other consideration whatever was said notes made and delivered as aforesaid. And the defendant alleges that he removed from said real estate all of the said pine timber, under said agreement, of every kind and quality, and that the total amount of pine timber upon the said real estate at the date of the giving of said promissory notes was only one million seven hundred and sixty-two thousand eight hundred and thirty-six feet, and no more (1,762,836). That except as aforesaid there never was any consideration for the giving of the said promissory notes or payment of the same by the defendant.

The defendant further shows that he has paid the plaintiff in full for all of said pine timber aforesaid.

Save as hereinbefore admitted, traversed, or denied, the defendant denies each and every allegation in said plaintiff's complaint contained, and avers that no allegation thereof is true.

Wherefore defendant demands judgment against the plaintiff for costs, or for such other or further relief in the premises as may be just and equitable.

ORLO B. GRAVES,
Def't's Att'y.

STATE OF WISCONSIN, } ss:
Brown County, }

L. M. Marshall, the defendant above named, being first duly sworn, on oath says: That he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge.

L. M. MARSHALL.

Subscribed and sworn to before me, February 10th, 1877.

ORLO B. GRAVES,
Notary Public, Wis.

This agreement, made and concluded this twenty-sixth day of April, A. D. 1873, by and between Stephen Hubbard, of the county of Manitowoc and State of Wisconsin, party of the first part, and Nicholas Gillin and Hugh Monroe, of the town of New Denmark, Brown county, in said State, parties of the second part, witnesseth:

That the said parties of the second part hereby agree and bind themselves and their legal representatives to pay, or cause to be paid, to the said party of the first part, his heirs or assigns, the sum of nine thousand eight hundred and eight dollars ($9,808.00)
12 in the manner following:

In twelve equal quarter annual payments or installments of eight hundred and seventeen and $\frac{33}{100}$ dollars each, to wit:

The first payment to be made on the first day of August, A. D. 1873, and one payment of eight hundred and seventeen and $\frac{33}{100}$ dollars every three months thereafter until paid, to wit, on the first day of November, 1873; on the first day of February, May, August, and November, 1874; on the first day of February, May, August, and November, 1875; and on the first day of February and May, 1876.

The said payments to be made to the party of the first part or to his order, and the same being intended to apply, when fully completed, as the purchase-money of the following tract, piece, or parcel of land, to wit:

The west half of the northeast quarter of section number eleven (11) and the northwest quarter of section number twelve (12), all in town number twenty-two, range number twenty-one east. Excepting and reserving to the said party of the first part all the white oak timber standing, lying, and being on said west half of the northeast quarter of section eleven (11) aforesaid, and also to apply as the purchase-money of the pine timber and the whole thereof now
13 standing, lying, and being on the south half of section number twelve (12), in town number twenty-two, range number twenty-one aforesaid. Which said pine timber is to be cut and taken off in accordance with contracts heretofore made in the sale of said land, and also before the time has run on tax titles; and further, said payments are intended as the purchase price of the pine timber and the whole thereof now standing, lying, and being on the east half of the northwest quarter of section number eighteen, town twenty-two, range twenty-two east, and on the west half of the southeast, and the east half of the southwest, quarter of section number eleven, town twenty-two, range twenty-one east, all of which above-described lands are situated in the county of Brown, Wisconsin.

The said parties of the second part hereby agree and covenant that all the pine timber that is cut on said lands is to be manufactured at the mill now being built on the old site of the mill formerly owned by Hugh Monroe in the town of New Denmark, in said county.

And said parties of the second part further covenants and agree that one-fourth of all moneys for the sale of the lumber and shingles manufactured and sold shall be held by the purchaser or purchasers of the same, to be applied to the payment of the installments that

shall become due next after said sale, or so much thereof as may be necessary to make such payments.

14 It is hereby understood, covenanted, and agreed by and between the parties hereto that the title to all of said property is to be and remain in the said party of the first part until the payments of said principal sum and interest shall be fully made.

The said parties of the second part further agree and covenants that they will pay all taxes, special or general, which may be assessed on the west half of the northeast quarter of section number eleven and the northwest quarter of section number twelve, town number twenty-two, range twenty-two aforesaid, from and after the date hereof, whenever such taxes shall become due and payable by law, until the aforesaid purchase-money be fully paid in the manner above stated; and also to hold said premises from the date hereof as the tenant at will or sufferance of the said party of the first part subject to be removed as tenant holding over by process, under the statute in such case made and provided, whenever default shall be made in the payment of any of the installments of purchase-money above specified; and also to keep the buildings, fences, and improvements on said premises in as good repair and condition as they now are, except ordinary wear and decay and damage by the elements.

The said party of the first part hereby agrees, and binds his heirs, executors, and administrators, that in case the aforesaid sum

15 of nine thousand eight hundred and eight dollars, with the interest, shall be fully paid at the time and in the manner above specified, he will relinquish all right, title, or claim to the timber standing, lying, and being on said lands, except the white oak timber above expressly excepted, and will, on demand thereafter, cause to be executed and delivered to the said parties of the second part, or to their legal representatives, a good and sufficient deed in fee-simple of the west half of the northeast quarter of section eleven and the northwest quarter of section twelve, all in town. twenty-two, range twenty-one, in Brown county and State aforesaid, free and clear of all legal liens and incumbrances, except the taxes herein agreed to be paid by the parties of the second part, and the white oak timber expressly excepted.

And it is distinctly agreed and understood by and between the parties hereto that if the said parties of the second part shall fail to make any of the payments of the purchase-money above specified, and the time and in the manner above specified, in such case this agreement shall be henceforth utterly void, and all payments thereon forfeited subject only to be reviewed and renewed by the act of the party of the first part, or the mutual agreement of both parties. And it is further understood and agreed that all the pine timber on the east half of the N. W. ¼ of sec. 18, town 22, range 22, and the W. ½ of S. E. ¼ and the E. ½ S. W. ¼ of sec. 1 and S. ½ of sec. 12,

16 town twenty-two, range 21, to be cut and manufactured into shingles and lumber before any is cut on the W. ½ of N. E. ¼ of sec. 11 and N. W. ¼ of sec. 12, town 22, range 21, aforesaid.

And it is further covenanted and agreed that all the pine logs & timber now lying & being in, upon, and about the mill yard of the

parties of the second part, and which were cut and hauled from sec. 12, town 22, range 21, shall be subject to all the conditions of this agreement.

It is hereby mutually agreed that the interest to be paid by the said parties of the second part on the purchase-money hereinbefore mentioned shall be at the rate of ten per cent. per annum and to be due and payable annually on the whole amount unpaid.

In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

STEPHEN HUBBARD. [SEAL.]
NICHOLAS GILLIN. [SEAL.]
HUGH MUNROE. [SEAL.]

In presence of—
G. KUSTERMANN.

Filed Sept. 19, 1879. EDM. P. BOLAND, *Clerk.*

Amended Answer.

Brown County Circuit Court.

STEPHEN HUBBARD, Pl'ff, *vs.* L. M. MARSHALL, Def't.

The def't for an amended answer to the complaint of the
17 said pl'ff shows and avers:

1st. The def't admits that he made, executed, and delivered the two notes mentioned & described in the plaintiff's complaint, & the several payments as endorsed thereon, and that the plaintiff is the holder of said notes.

2nd. That said notes, together with one other of like amount, date, & interest, and the sum of twenty-five hundred and seventeen dollars & fifty-eight cents, cash, to equal the sum of ten thousand fifty-eight dollars and thirty cents, were made, delivered, & paid to said plaintiff by this def't on the 23rd day of May, 1874, as the purchase or contract price of and for, 1st, the agreement and sale to this def't by said plaintiff of two mortgages of the northwest quarter of the southwest quarter of sec. 7, town 22, range 22, Brown Co., State of Wisconsin, together with three notes of Hugh Munroe for $800 each, made March 1st, 1872, and on which five hundred dollars have been paid and endorsed on said notes, together with a note of one Nicholas Gillin for one thousand twelve dollars & eighty-eight cents, dated June 21st, 1873, with ten per cent. interest; 2nd, for a certain land and timber contract made between the said plaintiff and Hugh Munroe & one Nicholas Gillin, bearing date April 26th, 1873, for the conveyance to said Munroe & Gillin of the west $\frac{1}{2}$ of N.
18 E. $\frac{1}{4}$ of sec. 11 and northwest $\frac{1}{4}$ of section 12, town 22, range 21, Brown Co., Wis., together with all the pine timber growing or on the west $\frac{1}{2}$ of S. E. $\frac{1}{4}$, E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$, sec. 11, east $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of sec. 18, and the south $\frac{1}{2}$ of section 12, all in town 22, range 21, Brown Co., Wisconsin. That it was expressly agreed & understood by and between this def't and said plaintiff, and said notes, mortgage, & contract were assigned, sold to, & received by this def't,

who had acquired the right of said Munroe & Gillin, and the said cash & notes made by this def't were delivered on the said express understanding and agreement and guarantee, then & there made by said pl'ff, viz., on said 23rd day of May, 1873, that there was standing, being on, or growing upon the real estate named in said contract three million feet of good, sound, merchantable pine timber fit to be manufactured into lumber and shingles, and then & there, as this def't avers, worth the sum of two dollars & fifty cents per M stumpage, and at no other rate the def't and pl'ff figured the said supposed three million feet said to be on said lands to make up the consideration of said payment & notes aforesaid of $1,058.30; that the said plaintiff then and there covenant- and agreed that there was the full amount of three million feet of said pine timber on said lands, and further covenanted and agreed that if there was not that amount of timber on said lands, then this
19 def't was only to pay in proportion to the amount of timber that there was in fact on said lands at said rate of two dollars & fifty cents pr. M; that this was & is the sole and only consideration for said notes and for said payments; that this def't, before the commencement of this action, caused to be cut, hauled, and taken from said lands all of the said pine timber thereon of every kind fit for use; that all the pine timber on said land so taken amounted to one million seven hundred and sixty-two thousand eight hundred & thirty-six feet, & no more (1,762,836); that there is an ascertained shortage from the said three million feet of one million two hundred and thirty-seven thousand one hundred and sixty-four feet (1,237,164), and for which amount, at the rate of two dollars and fifty cents per M, this def't claims & avers a part failure of the consideration of said notes, and that the same may be allowed him as against the claim of the said plaintiff in this action, & in reduction thereof; that this def't has heretofore, & before the commencement of this action, paid to said plaintiff on said contract of purchase aforesaid & said notes the sum of six thousand seven hundred and twenty-three dollars and fifty-three cents, and that the said part failure of consideration amounts to the sum of three thousand seventy-four dollars and forty cents.

HUDD & WIGMAN,
Att'y- for Def't.

20 STATE OF WISCONSIN:

L. M. Marshall, being first sworn, says: That he is the def't above named; that he has heard read the foregoing amended answer, & that the same is true of his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes it to be true.

L. M. MARSHALL.

Subscribed & sworn to before me, this 18th day of September, 1879.

T. R. HUDD,
Notary Public, Brown Co., Wis.

Filed in open court Sept. 18, 1879.

EDM. P. BOLAND, *Clerk.*

Reply to Counter-Claim.

STATE OF WISCONSIN:

In Circuit Court, Brown County.

STEPHEN HUBBARD *vs.* L. M. MARSHALL.

And now comes the above-named plaintiff, & for a reply to the counter-claim set forth in def't's answer denies each and every allegation thereof constituting a counter-claim, & denies that said assignment or agreement, a copy of which said assignment or agreement is annexed to answer of def'ts, marked "A," was duly made, & the said notes made & delivered by & with the express understanding & agreement by and between the said plaintiff & def't, the pl'ff guarantee- that there was then standing, being growing in &
21 upon the real estate in said agreement or contract as aforesaid described, at the least, three million feet of good, sound, merchantable, sound timber, fit to be manufactured into lumber and shingles, and pl'ff denies that the pl'ff then and there covenanted & agreed that there was the full amount of three million feet of pine timber on said land & premises as aforesaid, and if there was not that amount of timber on said premises as aforesaid, then this def't was only to pay in proportion to the amount of timber that there was in fact upon said real estate, and for no other consideration whatever was said notes made and delivered as aforesaid; & pl'ff denies that there was ever at any time any agreement between the pl'ff and the def't in reference to the amount of pine timber on said land, and further denies that the pl'ff ever at any time guaranteed to the def't or any other person that there was three million feet of any kind of pine on said land; and pl'ff further denies that he ever at any time guaranteed that there was any amount of pine timber whatever on said land; & pl'ff further denies that he ever at any time agreed with def't or any other person that def't might pay for said timber in proportion to the amount found thereon; and pl'ff further denies, upon information and belief, that there was only one million feet of pine timber on said land.

22 J. D. MARKHAM,
Att'y for Pl'ff.

STATE OF WISCONSIN, }
Manitowoc County, } *ss*:

J. D. Markham, being duly sworn, on oath says: That he is the pl'ff's att'y in the above-entitled action; that he has read the foregoing reply & knows the contents thereof, & that the same is true of his own knowledge, except as to those matters therein stated to be on information & belief, & as to those matters he believes it to be true.

Deponent further says: That the grounds of his information & belief is derived from the plaintiff by letters written to deponent by said pl'ff, and the reason why pl'ff does not make this affidavit is, that said plaintiff is a non-resident of this State, but is a resident of

& resides in the State of Texas, & is not now within the county of Manitowoc, where *is* his said att'y resides, to make it.

J. D. MARKHAM.

Sworn to before me this, 15th day of March, 1877.

FRED. HARRIS,
Notary Public.

Filed Sept. 19, 1879.

EDM. P. BOLAND, *Clerk.*

Jury.

STEPHEN HUBBARD *vs.* L. M. MARSHALL.

1, John Monette; 2, Joseph Beth; 3, E. R. Van Galder; 4, Alfred Bonchard; 5, Frank Van Ere; 6, Geo. P. Hay; 7, Reamus Peterson; 8, M. J. Touhey; 9, Gabriel Bremeret; 10, Patrick Caldwell; 11, Charles Mead; 12, James Faulkner.

23

Verdict.

STEPHEN HUBBARD *vs.* L. M. MARSHALL.

We, the jury, find for the plaintiff in the above-mentioned case in the sum of eight hundred sixty-seven & $\frac{22}{100}$ dollars ($867.22).

E. R. VAN GALDER, *Foreman.*

Filed Sept. 19, 1879, at 11.30 a. m.

EDM. P. BOLAND, *Clerk.*

Order Overruling Motion for a New Trial.

Circuit Court, Brown County.

STEPHEN HUBBARD, Pl'ff, *vs.* L. M. MARSHALL, Def't.

At a general term of said court, begun and held at Green Bay, the — day of September, 1879.

The plaintiff in this case having moved for a new trial upon the judge's minutes, and upon exceptions filed, and after hearing J. D. Markham and H. J. Huntington, plaintiff's attorneys, for said motion, and Messrs. Hudd & Wigman in opposition thereto—

Ordered, that said motion for a new trial herein be, and the same hereby is, denied and overruled.

By the court: GEO. H. MYERS, *Judge.*

Dated Nov. 7th, 1879.

We hereby except to the foregoing order.

J. D. MARKHAM & H. J. HUNTINGTON,
Pl'ff's Att'ys.

24 Filed Nov. 7, 1879. EDM. P. BOLAND, *Clerk.*

Judgment.

Circuit Court, Brown County.

STEPHEN HUBBARD, Plaintiff,
against
L. M. MARSHALL, Defendant.

At a general term of said court, begun and held at the court-house in the city of Green Bay, in said county, on the — day of September, 1879.

This action have come on for trial before a jury at a general term of said court on the — day of September, 1879, and the jury having found a verdict for the plaintiff in said action, and having assessed his damages at the sum of eight hundred sixty-seven and $\frac{22}{100}$ dollars, now, on motion of J. D. Markham and H. J. Huntington, plaintiff's attorneys, it is adjudged that the plaintiff have and recover of and from the defendant the sum of eight hundred and sixty-seven dollars and twenty-two cents damages, and the further sum of sixty-one and $\frac{91}{100}$ dollars costs, amounting in all to the sum of nine hundred and twenty-nine & $\frac{13}{100}$ dollars.

By the court: GEO. H. MYERS, *Judge.*

Dated Nov. 7th, 1879.

Attest: EDM. P. BOLAND, *Clerk.*

Let the clerk tax and enter plaintiff's costs herein.

By the court: GEO. H. MYERS, *Judge.*

Filed Nov. 7, 1879. EDM. P. BOLAND, *Clerk.*

25 *Notice of Appeal.*

Circuit Court, Brown County.

STEPHEN HUBBARD, Pl'ff, *against* L. M. MARSHALL, Def't.

GENTS: You will please take notice that the above-named plaintiff hereby appeals to the supreme court of the State of Wisconsin from the whole of the judgment rendered in favor of the plaintiff, and against the defendant in this action, for nine hundred twenty-nine dollars and thirteen cents damages and costs of this action, rendered on the 7th day of November, 1879, and entered on the 26th day of December, 1879.

Dated January 8th, 1880.

J. D. MARKHAM,
Att'y for Plaintiff.

To Messrs. Hudd & Wigman, att'ys for defendant, and Edm. P. Boland, clerk of the circuit court of Brown county, Wisconsin.

Filed Feb'y 13, 1880. EDM. P. BOLAND, *Clerk.*

We admit service of copy of the within Feb. 13, 1880.

HUDD & WIGMANN,
Att'ys for Deft.
EDM. P. BOLAND,
Clerk Circuit Court, Brown Co, Wis.

Bond on Appeal.

Circuit Court, Brown County.

STEPHEN HUBBARD, Pl'ff, *ag'st* L. M. MARSHALL, Def't.

Whereas on the 7th day of November, 1879, the plaintiff recovered judgment in the circuit court of Brown county against said defendant for the sum of eight hundred sixty-seven dollars and
26 twenty-two cents damages, and sixty-one dollars and ninety-one cents costs, which said judgment was entered in said court on the 26th day of December, 1879;

And whereas the said plaintiff intends to appeal to the supreme court of the State of Wisconsin from the whole of said judgment:

Now, therefore, we, Calvin C. Barnes and Charles Luling, do hereby undertake, pursuant to the statute in such case made and provided, that the appellant will pay all costs and damages which may be awarded against said appellant on said appeal, not exceeding two hundred and fifty dollars.

S. HUBBARD,
By J. D. MARKHAM,
His Att'y.
C. C. BARNES.
CHARLES LULING.

STATE OF WISCONSIN, } *ss:*
Manitowoc County, }

C. C. Barnes and Charles Luling, being each duly sworn, do each, for himself, depose and says that he is one of the sureties in the above undertaking, whose name is hereto subscribed.

And said affiants further says, each for himself, *says* that he is worth the sum of five hundred dollars over and above all his debts and liabilities in property within this State not by law exempt from execution, and that he is a resident and freeholder within the State

C. C. BARNES.
CHARLES LULING.

27 Subscribed and sworn to before me, February 9th, 1880.

GEO. B. BURNET,
Notary Public.

Filed Feb'y 13th, 1880. EDM. P. BOLAND, *Clerk.*

BROWN COUNTY, *ss:*

Circuit Court for Brown County.

I, Edm. P. Boland, clerk of said court, do hereby certify that the foregoing and annexed paper writings are the original summons,

complaint, answer, stipulation, two promissory notes, subpœnas, list of jurors, amended answer, charge of court, exceptions of pl'ff to charge of the court, verdict, order overruling motion for new trial, judgment, clerk's fee bill, plaintiff's cost bill, notice of appeal, undertaking on appeal to the supreme court, bill of exceptions, which have been filed in my office in the action wherein Stephen Hubbard is plaintiff, and L. M. Marshall is defendant, and that the same are hereby transmitted to the judges of the supreme court of Wisconsin, pursuant to said notice of appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the clerk's office, in the city of Green Bay, this 21st day of June, A. D. 1880.

[SEAL.] EDM. P. BOLAND, *Clerk.*

28 *Opinion of Supreme Court of State.*

Supreme Court Wisconsin.

STEPHEN HUBBARD, Appellant, *vs.* L. M. MARSHALL, Respondent.

Action on two promissory notes, each for $2,517.58 and ten per cent interest, made by the defendant to the plaintiff. Deducting endorsements, there appeared to be due on the notes by their terms about $5,500 at the date of the trial.

The facts necessary to an understanding of the question determined by this court are as follows:

The plaintiff, one Gillin, and one Munroe entered into a contract in writing, under seal, by which the plaintiff sold to Gillin and Munroe the timber on certain lands and agreed to convey to them certain other lands, all for the sum of $9,808. The plaintiff was to execute a conveyance of the lands when the said sum should be fully paid. The contract contains stipulations concerning the times of payment, the payment of taxes, and the effect of a default, and also for the security of the plaintiff. The defendant afterwards acquired the rights of Gillin and Munroe under the contract. Over a year later the plaintiff sold, assigned, and delivered to the defendant, for the agreed consideration of $10,058.30, certain notes and mortgages which he held against said Munroe, and
29 all his interest in the above-mentioned contract with Gillin and Munroe, except as to one parcel of the land which he had covenanted to convey to them. The assignment of these choses in actions is in writing, under seal, executed by the plaintiff alone. The instrument states the consideration, and also contains stipulations for the security of the plaintiff and the effect of a default by the defendant to make the payments as therein specified.

In execution of said agreement the defendant made and delivered to the plaintiff his three promissory notes, each for the same sum, and paid the balance of the consideration in cash. He has since paid one of said notes and the other two are the notes in suit.

The defendant alleges in substance in his answer that when such agreement was made between the parties the plaintiff represented that there was 3,000,000 feet of pine lumber on the lands described

in the agreement, and that he agreed to allow the defendant at the rate of $2.50 per thousand feet for any shortage; also, that there was a shortage of over 1,200,000 feet, amounting, at the stipulated rate, to over $3,000. This sum the defendant claimed should be deducted from the principal of the notes.

The above-mentioned instruments were put in evidence by the plaintiff on the trial. Neither of them contains the agreement thus alleged in the answer.

Against the objection of plaintiff, the court allowed the de-
30 fendant to introduce evidence tending to prove the agreement as alleged and the shortage.

The jury assessed the plaintiff's damages at $867.22.

A motion by the plaintiff for a new trial, on the ground (among others) that the court erred in admitting evidence of the alleged cotemporaneous parol agreement, was denied by the court, and judgment for the plaintiff was rendered pursuant to the verdict.

The plaintiff has appealed from the judgment.

LYON, J.: The rule that proof of antecedent or cotemporaneous verbal agreement between the parties cannot be received to alter or control their written agreement was applied in Underwood *vs.* Simonds, 12 Met., 275. The action was by the payee against the maker of a promissory note payable absolutely by its terms, and it was held that evidence was not admissible as a defense that the maker took property of the payee to dispose of as his own; that he sold the property to one Gibbs and took his note therefor, which note he was unable to collect, and that he gave to the plaintiff the note in suit upon an oral agreement between them that it was not to be paid unless the defendant should collect the note of Gibbs. The rule, the reason thereof, and its application to that case are so clearly and satisfactory stated in the opinion of Chief Justice Shaw that we cannot do better than to make the following
31 quotation therefrom: The rule of law is well established that parol evidence cannot be admitted to alter, vary, or control a written contract, nor to annex thereto a condition or defeasance not appearing on the contract itself.

The rule is founded on the long experience that written evidence is so much more certain and accurate than that which rests in fleeting memory only that it would be unsafe, when parties have expressed the term of their contract in writing, to admit weaker evidence to control and vary the stronger, and to show that the parties intended a different contract from that expressed in writing signed by them. Hunt *vs.* Adams, 7 Mass., 518; Curtis *vs.* Wakefield, 15 Pick., 437; Morley *vs.* Wanford, 10 Barn. & Cres., 729; St. Louis Perpetual Ins. Co. *vs.* Homer, 9 Whet., 39.

The proposed defence would consist in proof, by parol evidence, that a condition was annexed to the payment. By the terms of the note the defendant promised to pay the plaintiff absolutely one hundred and fifteen dollars. By the parol evidence he desired to prove that he was to pay it on condition that he could collect the Gibbs note."

The question to be determined here is, whether the above rule is applicable to this case.

Parol evidence is undoubtedly competent to show a total or partial failure of the consideration of a note or other written con-
32 tract, or where only part of the contract is reduced to writing to prove the portion which the parties have allowed to rest in parol, or to contradict a mere receipt, which does not purport to contain the contract out of which it arose; or to show the manner in which, or the fund out of which, the note or obligation is to be paid, provided it does not vary the contract expressed in the writing; or to show a consideration different from that expressed in the writing; or to prove the oral agreement of the parties if the writing does not profess to state it, but is made merely for the purpose of passing title pursuant to the agreement. This court has approved of the admission of parol evidence for many of the foregoing purposes in the following and other cases: Frey *vs.* Vanderhoof, 15 Wis., 397; Ballston Spa Bank *vs.* Marine Bank, 16 Wis., 120; Jones *vs.* Keyes, *id.*, 562; Hahn *vs.* Doolittle, 18 Wis., 196; Butler *vs.* The Regents, 32 Wis., 124.

The admission of parol evidence for the various purposes above indicated do not constitute exceptions to the general rule first stated. It is received on the ground that the argument to which it relates has not been reduced to writing. If the parties have reduced their contract, and the whole of it, to writing, and the instrument is free from ambiguity or uncertainty, the courts have universally
33 applied the rule, and excluded parol testimony to vary the terms of the contract. No court has done so with greater fidelity than has this court. The following are some of the later cases in which the rule has been applied:

Richardson *vs.* Johnson, 41 Wis., 100; Knox *vs.* Clifford, 38 Wis., 651; Charles *vs.* Dennis, 42 Wis., 56; Eaton *vs.* McMahon, *id.*, 484; Lawler *vs.* Count, 36 Wis., 176; Yenner *vs.* Hammond, *id.*, 277; Crawford *vs.* Earl, 38 Wis., 312; Cooper *vs.* Cleghorn (decided herewith).

Of course the foregoing remarks have no application to an action wherein it is sought to avoid a written contract or obligation for fraud in its inception, or to action brought to correct mistakes in such instruments. To prove the fraud or mistake parol evidence is freely received, and necessarily so. But as a sort of compensation for this apparent departure from the general rule the existence of the alleged fraud or mistake can only be established by the most clear and convincing evidence.

As it is put in some of the cases it must be proved beyond a reasonable doubt. A mere preponderance of evidence is not sufficient.

The learned counsel for the defendant argued, if we understand him correctly, that proof of the alleged guaranty by the plaintiff that the land which he covenanted to convey to the defendant con-
34 tained 3,000,000 feet of pine lumber, and his agreement that he would pay the defendant $2.50 per thousand feet for the shortage, if any, together with proof of the shortage, was

merely showing a partial failure of consideration, which may always be done by parol evidence. Also that the whole contract was not reduced to writing; and some stress is laid upon the fact that the defendant did not sign the written instrument which contains the terms of the agreement. That was signed by the plaintiff alone.

It is settled in this court that the acceptance by the grantee of a deed or land contract executed by the grantor alone binds such grantee.

Lawler *vs.* Counit, 36 Wis., 176; Hutchinson *vs.* R'y Co., 37 Wis., 582 (601).

Hence the instrument signed by the plaintiff alone and accepted by the defendant is as much the written agreement of the latter as it is of the former.

The rule which allows the maker of a promissory note to show, in an action upon it, a failure or partial failure of consideration is not sufficiently broad to cover this case. Here we have written instruments which set out particularly the consideration of the notes in suit, to wit, the assignment of notes and mortgages and of a contract to convey lands and to sell timber upon other lands.

The right to prove a failure of consideration would admit evidence of the failure of consideration expressed in the writings as
35 that the title to any of the property thus sold or assigned had failed, but does not go to the extent of allowing proof of an additional consideration not expressed in the writings, and a failure thereof. To hold otherwise would be to destroy the rule which prohibits parol evidence to contradict or vary written instruments.

The instrument signed by the plaintiff and accepted by the defendant, and the notes signed by the latter and delivered to the former, constitute an agreement in writing. The terms of the agreement are clearly expressed, and the writings contain no clause from which it may be inferred that the parties did not intend to incorporate in them the contract just as it was made, and the whole of it. There is no claim of mistake or suggestion of fraud. The writings purport to state the whole contract, and in the absence of any claim of fraud or mistake, they must be held to contain the whole contract.

The case of Lawler *vs.* Counit, *supra*, is very similar to this case in its facts, and fully sustains the above views. The case above quoted in 12 Met. is also authority against the admission of evidence that the agreement of the parties contained an important condition not inserted in the writings. The cases to the same effect are very numerous, but it is not deemed necessary to refer specially to more of them. Many of them are cited in the foregoing cases.

We conclude that the parol evidence to show that the
36 plaintiff understood that the land should yield 3,000,000 feet of lumber, and promised to pay at a specified rate for the shortage, was erroneously admitted. It is manifest that the recovery would have been much greater had this evidence been ruled out. There must therefore be another trial.

Judgment reversed and cause remanded for a new trial.

STATE of WISCONSIN:

Supreme Court.

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original opinion of the court on file in my office, in the above-entitled cause, and that it is a correct transcript therefrom.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Madison, the fourth day of October, A. D. 1880.

CLARENCE KELLOGG,
Clerk of the Supreme Court of Wisconsin.

Filed June 20, 1881.

EDM. P. BOLAND,
Clerk Circuit Court, Brown Co., Wis.

Order of Renewal by Supreme Court.

Supreme Court, State of Wisconsin.

Begun and held at the capital in Madison, the seat of government of said State, on the second Tuesday, to wit, on the tenth day
37 of August, A. D., 1880, on the seventh day of the term, to wit, on the twenty-first day of September, A. D. 1880, present, E. G. Ryan, Chief Justice, and Orasmus Cole, William P. Lyon, Harlow S. Orton, and David Taylor, associate justices of said court, the following proceedings were had, *inter alia*, to wit:

STEPHEN HUBBARD, Appellant, *vs.* L. M. MARSHALL, Respondent.

Appeal from circuit court of Brown county, Wisconsin.

This cause came on to be heard, on appeal from the judgment of the circuit court of Brown county, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the circuit court of Brown county, in this cause, be, and the same is hereby, reversed, with costs against the said respondent, taxed at the sum of one hundred and forty-three ($143.00) dollars.

And that this cause be, and the same is hereby, remanded to the said circuit court with directions to award a *venire facias de novo.*

STATE OF WISCONSIN, } ss:
Supreme Court, }

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original order and judgment of the court in the above-entitled cause, and that it is a correct transcript therefrom.

38 In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Madison, this twenty-first day of September, A. D. 1880.

CLARENCE KELLOGG,
Clerk of the Supreme Court of the State of Wisconsin.

Filed Jan. 20, 1881.

EDM. P. BOLAND,
Clerk Circuit Court Brown Co., Wis.

Notice of Motion to Remove Cause to U. S. Court.

STATE OF WISCONSIN:

Circuit Court, Brown County.

STEPHEN HUBBARD. Pl'ff, *ag'st* L. M. MARSHALL, Def't.

GENTS: Please to take notice that on the petition of the plaintiff in this suit, and the bond accompanying the same, and on the notice of the appearance of the def't herein, and on the affidavit of the plaintiff, copies of which said petition, bond, notice, and affidavit are herewith served and all the papers and proceedings in this suit, I shall move this honorable court, at a regular term thereof to be held at Green Bay on the 7th day of March, 1881, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order staying all proceedings in this suit in the said circuit court of Brown county, Wisconsin, and removing this suit from the said circuit court of Brown county aforesaid to the circuit court of
39 the United States for the eastern district of Wisconsin, under the provisions of the act of Congress, approved the 3rd day of March, 1875, & section 639 of the Revised Statutes of the United States.

Yours, &c.,

J. D. MARKHAM,
Att'y for Plaintiff.

Dated February 16th, 1881.
To Messrs. HUDD & WIGMAN,
Att'ys for Defendant.

Filed Feb. 23, 1881.

EDM. P. BOLAND,
Clerk Circuit Court, Brown Co., Wis.

STATE OF WISCONSIN, } ss:
Manitowoc County, }

Circuit Court, Brown County.

STEPHEN HUBBARD, Pl'ff, *ag'st* L. M. MARSHALL, Def't.

I, Stephen Hubbard, being duly sworn, do say: That I am the plaintiff in the above-entitled cause; that I have reason to believe, and do believe, that, from prejudice and local influence, I will not be able to obtain justice in said circuit court.

STEPHEN HUBBARD.

Subscribed and sworn to before me, this 1st day of February, 1881.

[SEAL.] CHARLES LULING,
Notary Public.

Filed Feb. 23, 1881.

EDM. P. BOLAND,
Clerk Circuit Court, Brown Co., Wis.

40 *Petition for Removal to U. S. Court.*

Circuit Court, Brown County.

STEPHEN HUBBARD, Pl'ff, *ag'st* L. M. MARSHALL, Def't.

To the honorable the circuit court of Brown county, State of Wisconsin:

Your petitioner, Stephen Hubbard, respectively shows: That he is the plaintiff in foregoing-entitled suit, and that the same was by him commenced on or about the 3rd day of February, 1877, in said circuit court; that your petitioner was, at the time of bringing said suit, and still is, a citizen of the State [of] Texas, a resident thereof. Your petitioner further shows that there is and was, at the time said suit was brought, a controversy therein between your petitioner and the said defendant, L. M. Marshall, who is a citizen of the State of Wisconsin and a resident thereof; that said action was brought by your petitioner for the purpose of obtaining judgment upon two promissory notes signed by the defendant & payable to plaintiff, or order, for $2,035.16 each, with interest at ten per cent. per annum & each dated May 23rd, 1874; one payable one year after date, and the other eighteen months after date; and that the matter in dispute in this suits exceeds the sum of five hundred dollars, exclusive of costs. Your petitioner further represents that said suit was brought to trial and a judgment duly entered therein in favor of the
41 plaintiff on the 7th day of November, 1879, from which said judgment an appeal was duly taken to the supreme court of said State of Wisconsin, which said appellate court wholly reversed said judgment, and remanded said case to the court of original jurisdiction for a trial *de novo;* that said suit has not been tried *de novo,* but is now pending for trial in the said circuit court of Brown county, and that your petitioner wishes to remove the same into the circuit court of the United States for the eastern district of Wisconsin, in pursuance of the act of Congress in that behalf provided, to wit, the Revised Statutes of the United States, section 639, subdivision 3.

Your petitioner further says that he has filed the affidavit required by the statute in such cases, and offers herewith his bond, executed by Stephen Hubbard as principal and Calvan C. Barnes as surety, in the *final* sum of two hundred and fifty dollars, conditioned as by said act of Congress required. Your petitioner therefore prays that the said bond may be accepted as good and sufficient according to said act of Congress, and that the said suit may be removed into the

circuit court of the United States for the eastern district of Wisconsin, pursuant to the aforesaid act of Congress in such [case] made and provided, and that no further proceedings may be had therein
42 in this court; and your petitioner will ever pray, &c.

J. D. MARKHAM,
Att'y for Pl'ff.

Dated Feb. 1st, 1881.

Filed Feb. 23rd, 1881. EDM. P. BOLAND,
Clerk Circuit Court, Brown Co., Wis.

Bond for Removal to U. S. Court.

Know all men by these presents, that we, Stephen Hubbard, of Terrell, Texas, as principal, and Calvan C. Barnes, of the city & county of Manitowoc, Wisconsin, as surety, are hereby held and firmly bound unto L. M. Marshall in the penal sum of two hundred and fifty dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, by these presents.

The condition of this obligation is such, that if Stephen Hubbard shall enter and file, or cause to be entered and filed, in the next circuit court of the United States, and in and for the eastern district of Wisconsin, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in a certain suit or action now pending in the circuit court of Brown county, in the State of Wisconsin, in which Stephen Hubbard is plaintiff and L. M. Marshall is defendant, and shall do such other appropriate acts as by the act of Congress in that behalf are required to be done
43 upon the removal of such suit from said State court into the said United States court, then this obligation to be void; otherwise, of force.

STEPHEN HUBBARD.
CALVAN C. BARNES.

Dated February 1st, 1881.

STATE OF WISCONSIN, } ss:
Manitowoc County, }

I, Calvin C. Barnes, of said county, being duly sworn, say: That I am a resident of the State of Wisconsin and a property holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities, and exclusive of property by law exempt from execution; that I have property in the State of Wisconsin, liable to execution, of the value of more than five hundred dollars.

CALVAN C. BARNES.

Subscribed and sworn to before me, this 1st day of February, A. D. 1881.

J. D. MARKHAM,
Notary Public, Manitowoc County, Wis.

Filed Feb. 23, 1881. EDM. P. BOLAND,
Clerk Circuit Court, Brown County, Wis.

STATE OF WISCONSIN, } ss:
Manitowoc County, }

Circuit Court, Brown County.

STEPHEN HUBBARD *ag'st* L. M. MARSHALL.

J. D. Markham, being duly sworn, says: That he is attorney for the plaintiff in the above-entitled action; that on the 21st
44 day of February, 1881, he served the annexed affidavit, notice, motion, petition, and bond on Messrs. Hudd & Wigman, att'y- for def't, who reside at Green Bay, Wisconsin, by enclosing true copies of each said affidavit, notice, bond, and petition in an envalope, and properly addressed same to said Hudd & Wigman, at Green Bay, Wis., and depositing the same in the post office at Manitowoc, Wisconsin, on the 21st day of February, 1881, and paying the postage thereon; that there is a regular mail communication between Manitowoc and Green Bay aforesaid; that this deponant resides at Manitowoc aforesaid.

J. D. MARKHAM.

Subscribed and sworn to before me, this 21st day of February, 1881.

FRED. HARRIS,
Notary Public.

Filed Feb. 23, 1881. EDM. P. BOLAND,
Clerk Circuit Court, Brown Co., Wis.

Order of Removal to U. S. Court.

Circuit Court, Brown County.

STEPHEN HUBBARD, Pl'ff, *vs.* L. M. MARSHALL, Def't.

The plaintiff above named having duly filed an affidavit, petition, and bond for the removal of the above-entitled action to the circuit court of the United States for the eastern district of Wisconsin,
45 pursuant to subdivision 3 of section 639 of the Revised Statutes of the United States: It is *ordered* that said action be, and the same is hereby, *be, and the same is hereby,* removed to said circuit court for said eastern district of Wisconsin.

By the court: GEO. H. MYERS, *Judge.*

Dated March 11th, 1881.

Filed Mar. 11, 1881. EDM. P. BOLAND,
Clerk Circuit Court Brown Co., Wis.

STATE OF WISCONSIN, } ss:
Brown County, }

Circuit Court, Brown County.

STEPHEN HUBBARD, Plaintiff,
against
L. M. MARSHALL, Defendant.

I, Edm. P. Boland, clerk of the circuit court in and for the county of Brown, in the State of Wisconsin, do hereby certify that the

annexed and foregoing are true copies of each and of all the originals—process, pleadings, depositions, testimony, and other proceedings—in the above-entitled cause, and true copies of certified copies filed in this action, and of each thereof and of the whole thereof, and that the originals of said copies, and also the certified copies of said copies, and each thereof, are now on file and remaining of record in my office, and that I have compared the same with said originals and said certified copies, and the endorsements thereon and upon each thereof, filed in this court in the above-entitled action, and that the same are herewith transmitted to the circuit court of the United States for the eastern district of Wisconsin, pursuant to the order changing venue herein.

46

In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court, at Green Bay, Wisconsin, this second day of April, A. D. 1881.

[SEAL.] EDM. P. BOLAND,
Clerk of the Circuit Court, Brown County, Wisconsin.

Order allowing Def't to file Amended Answer.

47 May 23, 1881. This day came the defendant by his counsel and moved the court for a continuance of this cause upon affidavit filed. On consideration whereof it is ordered by the court that the same be continued until the fifth day of July next.

And came the defendant and moved the court for leave to amend his answer. And said motion being argued by Mr. Hudd for the defendant, and by Mr. Markham in opposition, and submitted, the court held the same under advisement.

May 24, 1881. This day came the parties by their counsel, and on consideration of the motion of the defendant for leave to file forthwith an amended answer in this cause, it is ordered by the court that he have such leave upon payment to the plaintiff's attorney of the necessary traveling expenses incurred by him in coming from Manitowoc to resist said motion, and the further sum of ten dollars attorney's fees.

And same day came the defendant, by his attorney, and filed his amended answer, as follows:

Amended Answer.

In United States Circuit Court, East'n District of Wisconsin.

STEPHEN HUBBARD, Plaintiff, *vs.* L. M. MARSHALL, Defendant.

48 The defendant, for a further and second amended answer to the complaint of the said plaintiff, shows, by leave of this court thereto first had and obtained on motion therefor, viz:

1st. The defendant admits that he made and delivered the two notes in plaintiff's complaint described and made the payments thereon, as endorsed on and so alleged in and by said complaint, and that plaintiff is now the owner and holder thereof.

2d. That said notes with one other of like amount, date, and interest, the last named now paid and taken up, and the sum of

twenty-five hundred and seventeen dollars and fifty-eight cents in cash to equal and make the sum of ten thousand fifty-eight dollars and thirty cents were made, delivered, and paid to said plaintiff by this defendant on the 23d day of May, 1874, as the consideration for and purchase price of two notes, secured by mortgage on the northwest quarter of the southwest quarter of section seven, town 22, range 22, Brown county, Wisconsin, made by Hugh Munroe for $800 each, dated March 12th, 1872, and on which notes five hundred dollars had been paid and endorsed before the purchase by the defendant; also a note of one Nicholas Gillen for one thousand twelve dollars and eighty-eight cents, dated June 21st, 1873, interest
49 10 per cent. per annum; also for the assignment and sale to the def't by the plaintiff of land, and the pine timber on land contract then existing by and between the said pl'ff, the owner of the land and the timber on the land mentioned, and Hugh Monroe and Nicholas Gillen; that said land and timber was all situated in Brown Co., State of Wisconsin, and had long before that date been owned and possessed by and known to the said plaintiff. That to induce this defendant to made said notes and pay said cash the said plaintiff then and there represented, agreed, guaranteed, and covenanted that there was then, viz., May 23rd, 1874, standing, being, or growing on the land so contracted with Monroe and Gillen, and then sought to be sold to this def't, three million feet of good, sound, merchantable pine timber, fit to be manufactured into lumber and shingles, and worth the sum of two dollars and fifty cents per M stumpage, and at that rate for said supposed guaranteed and agreed three million feet of pine or such lands the plaintiff and defendant figured to amount to the sum of ten thousand fifty-eight dollars and thirty cents, and placing the said land and timber thereon at seven thousand five hundred dollars, and the
50 other notes and mortgage above mentioned at the sum of twenty-five hundred fifty-eight dollars and thirty cents, which was all they were worth; that it was well known to said pl'ff that this def't wanted said contract-named lands only for the said pine timber; that the description of the lands so alleged to contain the said three million feet of pine timber was the west $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of section 11 and northwest $\frac{1}{4}$ of section 12, town 22, range 21; the west $\frac{1}{2}$ of S. E. $\frac{1}{4}$, E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ sec. 11, east $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of sec. 18, and south $\frac{1}{2}$ of sec. 12, town 22, range 21, said county of Brown. That at said time, and before the making and delivery of said notes and the payment of said sum in cash, plaintiff falsely and fraudulently represented and guaranteed that the said land contained, and would yield and cut, the amount of three million feet of good, merchantable pine timber; that said representation was fraudently made and untrue, as was well known to the said pl'ff at the time he made the same, and was so falsely and fraudulently made by him to induce this def't to purchase the same, and pay the cash, and make the said notes; that believing and trusting in the said statement and representation as to the said amount of pine timber on said
51 land, and solely induced thereby did this def't make and deliver said notes and pay said cash; that this def't has paid

to said pl'ff on said contract price and on said notes aforesaid the sum of six thousand seven hundred and twenty-three dollars and fifty-three cents prior to the commencement of this action; that this def't, before the commencement of this action, caused to be cut, hauled, and taken from said lands said to contain the said three million feft of pine timber all of the pine timber thereon of every kind fit for use; that all the pine timber on said land, when so sold to this def't, amounted to only one million seven hundred and sixty-two thousand eight hundred and thirty-six feet, and no more (1,762,836); that there is, and was, an ascertained shortage from the said three million feet so sold and contracted to this defendant of 1,237,164 feet, of the value then and there of two dollars and fifty cents per M, and amounting to the sum of three thousand seventy four dollars and forty cents, which sum the def't claims to recoup or set off as a part failure of the consideration of said notes, and that the same may be allowed him against so much of the said plaintiff's claim herein.

HUDD & WIGMAN,
Att'ys for Def't.

STATE OF WISCONSIN, } ss:
Brown County, }

52 L. M. Marshall, being first duly sworn, says: That he is the defendant above named; that he has heard read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters stated on information and belief, and as to these matters he believes it to be true.

L. M. MARSHALL.

Subscribed and sworn to before me, this 19 day of May, 1881.
T. R. HUDD,
Notary Public, Wis.

June 30, 1881. This day came the parties, by their counsel, and upon further consideration of the motion of the defendant for a continuance of this cause, and affidavit filed, it is ordered by the court that this cause be, and hereby is, continued at the costs of the defendant.

And afterwards, to wit, at a stated term of said court begun and held according to law at the city of Milwaukee on the first Monday of October, A. D. 1881, and on the fortieth day thereof, to wit, on the 25th day of November, A. D. 1881, the following proceedings were had, to wit:

Trial.

STEPHEN HUBBARD } At Law.
vs.
L. M. MARSHALL. }

53 This day came the parties by their counsel, Mr. J. D. Markham appearing for the plaintiff and Mr. Hudd for the defend-

ant, and the issue came on to be tried; whereupon a jury was called to try the same, who came, to wit: T. P. Collingbourne, J. G. J. Campbell, Nathan Brick, David R. Brewer, J. W. Hosford, P. C. Hale, John James, George Perkins, George W. Swift, Gilbert Dopp, John H. Tesch, and J. H. Crampton, twelve free, honest, and lawful men of the district, who were severally sworn and empanneled; and the trial not being concluded, the same was adjourned until to-morrow morning. And came the defendant, by his counsel, and moved the court for leave to amend his amended answer; and said motion being argued by the counsel of the parties, the court held the same under consideration.

November 26, 1881. This day came the parties by their counsel, and on consideration of the motion of the defendant to amend his amended answer, it is ordered by the court that said motion be, and hereby is, granted, upon condition that the defendant secure the attendance of Nicholas Gillen as a witness on Wednesday next, and pay the expenses of any further witnesses that the plaintiff may require to meet the matters set forth in the amendment to the
54 amended answer now filed. And the trial of the issue herein was then resumed; and not being concluded, the same was adjourned until Wednesday morning next; and which said amendment to answer this day filed is as follows, to wit:

Amendment to Amended Answer.

Def'ts amendment to answer to come in after fifth line of folio 7th, at the *, viz:

That upon the execution and delivery of said notes, & the payment of said cash, and the assignment of said contract for the pine land, and pine upon lands named in such assigned contract, the said Gillen and Monroe, with the knowledge and assent of said pl'ff, surrendered & abandoned all claim to said pine lands under said contract to this defendant, and thereupon, as it was understood by the plaintiff at the time the assignment was made, and the said cash paid and notes made, this defendant, at his own cost, risk, and expense, proceeded to cut, haul, and take from said lands all the merchantable and good pine thereupon; that upon such cutting, hauling, and taking away the ascertained shortage hereinafter named was found, and this def't suffered a loss thereby, and in consequence of the failure of the said lands to yield the said three million feet of pine timber, in the sum of three thousand seventy-four dollars and forty cents, for which sum the defendant has no
55 security of any form or nature, and has not received from any source any compensation therefor, and will be at the loss thereof unless the same is allowed him by way of recoupment therein.

November 30, 1881. This day came the plaintiff, by his counsel, and it appearing that Mr. Hudd, who commenced the trial of this cause on behalf of the defendant, is necessarily absent, it is, by con-

sent, ordered that the further trial of the issue herein be postponed until to-morrow morning.

December 1, 1881. This day came the parties, by their counsel, and the trial of the issue herein was resumed, and, not being concluded, the same was adjourned until to-morrow morning.

Verdict.

December 2, 1881. This day came the parties, by their counsel, and the trial of the issue herein was resumed; and the jurors of the jury aforesaid being charged by the court, on their said oaths, respectively, do say that they find the issue herein in favor of the plaintiff, and assess the damages to the said plaintiff at the sum of six thousand six hundred and ten dollars and thirty-six cents.

And came the defendant, by his counsel, and moved the court for a new trial for reasons filed, as follows:

56 *Motion for a New Trial.*

United States Circuit Court, E. District of Wisconsin. October Term, 1881.

STEPHEN HUBBARD, Pl'ff, *vs.* L. M. MARSHALL, Def't.

Now comes the said defendant, after verdict, and before judgment herein, and moves the court here for a new trial herein on the minutes of the court, for the reasons following:

1st. The court erred in directing a verdict for the plaintiff herein.
2nd. The said verdict was contrary to the evidence.
3d. The said verdict was contrary to the law.
Dated Dec. 2d, 1881.

HUDD & WIGMAN,
Att'ys for Def't.

December 31, 1881. This day came the defendant, by his counsel, and, on his motion, it is ordered by the court that the hearing of the motion for a new trial be, and hereby is, continued.

And now, at this same term, to wit, January term, 1882, and on the forty-third day thereof, to wit, on the second day of March, A. D. 1882, the following proceedings were had, to wit:

Judgment.

STEPHEN HUBBARD
vs.
L. M. MARSHALL. } At Law.

57 This day came the parties, by their counsel, and, on motion of the plaintiff, it is, without prejudice to the hearing and determination of the motion of the defendant for a new trial, considered and adjudged by this court, now here, that the said plaintiff do have and recover of the said defendant, L. M. Marshall, the sum of six thousand six hundred and ten dollars and thirty-six cents

damages, so as aforesaid assessed by the jury, together with one hundred eighty-seven dollars and sixty-two cents, his costs about his said suit in this behalf by him expended, and that he have execution therefor.

Judgment roll filed March 2nd, A. D. 1882.

EDWARD KURTZ, *Clerk.*

Damages	$6,610 36
Costs	187 62
	$6,797 98

And same day, by consent, it is further ordered that execution on this judgment be stayed until the hearing and determination of the motion for a new trial.

And afterwards, to wit, on the eighty-ninth day of said term, to wit, on the 2nd day of June, A. D. 1882—present, the Hon. Thomas Drummond, circuit judge, presiding, and the Hon. Charles E. Dyer, district judge—the following proceedings were had, to wit:

58 *Hearing of Motion for New Trial.*

STEPHEN HUBBARD
vs.
L. M. MARSHALL. } At Law.

This day came the parties, by their counsel, and the motion of the defendant for a new trial came on to be heard, and was argued by Mr. T. R. Hudd, for said defendant, and by Mr. J. D. Markham, for the plaintiff; and the hearing being concluded, the court held the same under consideration.

And afterwards, to wit, on the ninetieth day of said term, to wit, on the 3rd day of June, A. D. 1882—present, the Hon. Thomas Drummond, circuit judge, presiding, and the Hon. Charles E. Dyer, district judge—the following proceedings were had, to wit:

Order overruling Motion for New Trial.

STEPHEN HUBBARD
vs.
L. M. MARSHALL. } At Law.

This day came the parties, by their counsel, and on consideration of the motion of the defendant for a new trial, and the arguments of counsel thereon, it is ordered by the court that the said motion be, and hereby is, overruled; and it is further ordered by the court that the order heretofore entered, staying execution on the judgment in this cause, be, and hereby is, vacated, and that said judgment stand in full force and effect.

June 19, 1882. Bill of exceptions signed and filed, as follows, to wit:

59 *Bill of Exceptions.*

Circuit Court of the United States, E. Dist. of Wisconsin.

STEPHEN HUBBARD *vs.* L. M. MARSHALL.

Be it remembered that afterwards, to wit, on the 25th day of November, 1881, before the Hon. Charles E. Dyer, judge of the district court of the United States for the east'n district of Wisconsin, presiding in the circuit court of the United States for said district, held at Milwaukee, Wisconsin, comes as well the said Stephen Hubbard, by his attorney, J. D. Markham, as the said L. M. Marshall, by his attorneys, Hudd & Wigman, and a jury being called were duly empannelled and sworn to try the several issues herein joined.

The counsel for the defendant (the burden of proof under such issue being upon the said defendant, and so ordered by the court,) called L. M. Marshall as a witness in his own behalf, and who testified:

Resided in May, 1874, in Green Bay; business, for the last ten years I have dealt in lumber and shingles.

Q. Did you have a transaction on the 23rd of May, 1874, in regard to a contract with Gillen and Monroe?

(Plaintiff's counsel objects to the question, because it is admitted by the pleadings that the contract was reduced to writing, and that it is about land which they purchased from them.)

60 Mr. MARKHAM to witness: Was there any contract or agreement between you and Mr. Hubbard?

A. There was. It was not in writing. It was known to me that a contract existed between the plaintiff and Gillen and Monroe.

Q. Did that contract relate to land?

A. It did.

Mr. HUDD to witness: Look at that paper and state if it is the contract that you supposed existed between the plaintiff and Gillen and Monroe?

A. It is.

Defendant's counsel offers the contract in evidence. It is marked "Exhibit No. 1." (Contract read.)

It was in relation to this contract that I had the transaction with Mr. Hubbard.

Defendant's counsel introduces in evidence instrument in writing, which the reporter, at his request, marks "Exhibit No. 2."

Mr. HUDD: These two papers being in evidence, I wish you would state that the contract between yourself and the plaintiff in relation to the sale of the Gillen and Monroe contract, the notes and mortgages and lumber.

A. I had been advancing to them on their lumber and shingles, and handled them on commission, advancing them money and supplies. He (Hubbard) came into my office and wanted to sell me the contract that he had with Gillen and Monroe on the 23rd of May,

1874. I don't know as I can state all the conversation we
61 had, only the summing up of it. We talked some little time. The first transaction we had he said he wanted me to accept an order on Gillen & Monroe for quite a large amount, which I refused to do. When I refused to accept that order he wanted to have me buy the contract between Gillen & Monroe for the timber that was to be cut—the contract offered in evidence. He made a proposition to me to throw off fifteen hundred from what there was due him on the contract if I would buy it of him. My brother, James Marshall, I think, was present at this interview; at that time he was clerking for me. We had this conversation in the office of my store. I don't think Gillen & Monroe were there at that time—their names might have been mentioned, but the exact conversation I could not give you.

Ques. What was it Mr. Hubbard proposed to sell you?

Objected to.

COURT: Let the witness state all that was said, in answer to your general question, until his recollection is exhausted.

A. Hubbard offered to throw off fifteen hundred from the contract if I would buy it, and then we went on to find out what I was buying. I asked Mr. Hubbard how much pine there was left standing on that contract he was selling me, and his reply was there was three million good, merchantable pine left to cut yet; and then we talked about the value of that pine, how much the stumpage
62 would be, and it was agreed between us two dollars and a half a thousand stumpage; that is the way I figured it up. I think at that time he offered to take ten thousand dollars for the contract; he said he would lump it right out at ten thousand dollars, or would figure it up and take off fifteen hundred from what there was coming on the contract. My not knowing how much there was coming on the contract, I told him I would prefer to have it figured up; by his guaranteeing there was three million of pine on it I would take it; he said he would guarantee there was three million pine left on the land that was to be cut; I told him I would take it at the fifteen hundred dollars discount from the contract with Gillen and Monroe. After we got through talking we adjourned then and went to Billings' office, and they made out the papers, and I made out the notes, and they were consummated there.

Q. Was there any further agreement or understanding after you got to the lawyer's office, or was that all had in the store?

A. All had in the store; there was nothing said about the contract in the office; only just it was transferred to me.

Q. What was said, if anything, in relation to what you were to purchase from him, how much you were to pay him—how much were you to pay him in the first place?

63 A. We didn't know how much the purchase would amount to at that time; it was not figured up; they figured it up over to Billings' office; there was something said about a tract of

land that was to be reserved, that was not to be put into the contract—that was in the contract, but was not to be put in the contract transferred to me.

Q. Who talked about reserving that?

A. Mr. Hubbard. He said he wanted to reserve that part of the land and transfer the balance to me. I gave three notes and made a cash payment, which was twenty-five hundred and something. Three notes were given, payable in six, twelve, and eighteen months. The entire sum agreed upon to be paid was ten thousand and some odd dollars. It figured up the same as the contract, deducting fifteen hundred dollars; I don't recollect the exact amount; ten thousand and fifty odd dollars. The fifteen hundred dollars was subtracted, leaving ten thousand and fifty. I figured the three million of pine, $2.50 a thousand, $7,500; then there was the mortgage on the mill of one thousand dollars, and another mortgage of Monroe or a note there had been some paid on; I don't recollect the exact amount; I didn't consider it a note good for anything; Monroe was not able to pay it.

Q. How did you come to pay the $2.50?

64 A. I considered the stumpage of that value, and I think Hubbard assented to it. He knew we were figuring at $2.50 a thousand.

Q. Was there anything said by Mr. Hubbard—anything about if it should fall short of three million?

A. He said he would make it good. I asked him if he would give me time to find somebody to go and look over the land and examine the timber. He said he would not, it must be closed right up that day or he should proceed to take possession of it, or something of that kind. I had not been on the land before.

Q. Had you any way of ascertaining, except from Mr. Hubbard, the true state of the quantity of timber upon that land?

A. I had not. I knew nothing about it, only what I got from Mr. Hubbard. I was then dealing in pine timber, shingles, and lumber, and knew the general market. That quality of pine, located where that was, was worth $2.50. I would have paid that for any amount I could have got.

Q. What was the amount paid on the contract before the commencement of this suit?

A. Six thousand seven hundred and twenty-three dollars. I had Gillen and Monroe go on and cut the timber off and saw it up.

Mr. MARKHAM to the witness: Did you, or did you not, re-

65 ceive the original title of the mill property from Gillen and Monroe?

Ans. I took the mill of Gillen and Monroe. I took no deed of it. I took the mill and sold it, but not under the mortgages. They consented to let me have it if I would settle.

Q. They had the original title subject to the mortgage; did you take that title?

A. The mortgage was in my hands; I did not foreclose the mortgage; I don't know but they gave me a bill of sale of it. If they gave me a bill of sale, I think it was put in my safe; it is not here.

(Court allows def't's counsel to prepare and serve on pl'ff's counsel an amendment to answer. Amendment served.)

Testimony of James Marshall.

The evidence of JAMES MARSHALL, a witness for the defendant, was then taken as follows:

Resides at Steven's Point, Wis.; in 1874 resided at Green Bay, Wis; clerk then for def't, L. M. Marshall, his brother; heard the bargain made between the parties in relation to the pine land in controversy; heard it in the store—extreme back part of the store; think there was nobody present at the office except Hubbard, my brother, and myself; customers were in and out; Gillen was in some part of the store; I think he stood in front of the window, looking out of the door; this was in the forenoon in the first place when he came in; in the first place, Hubbard came, and wanted my
66 brother to buy some order that was drawn between him and Monroe; he refused to do it; then Hubbard started for the door, and the last words I heard him say he would be damned if he would not close the thing up to-day, and went off. Then Gillen started out of the store, and after a while Hubbard came back; then they talked about the sale of the property. Hubbard offered the contract he had with Gillen and Monroe to my brother, and on that contract offered to throw off fifteen hundred dollars, with the representation of a certain amount of pine, as I understood it then, as they had talked before; and my brother said to him, as he had never seen the property, and did not know anything about it, he was not ready to make a bargain on any such ground, and then Hubbard turned around to him, and says: "I am good for three million feet of pine, and, by God, I will warrant three million feet of pine on that land;" and my brother then says: there being three million feet of pine that he will warrant is good, he would close the trade; and then Hubbard says: "We will go over to the office and make the notes;" and my brother went out with him. That is all what I heard; that's all I know about the matter; the bargain was completed, and they went off to make the notes. What
67 I heard said was this: They reckoned the pine, the stumpage, at $2.50, and they were figuring what it would come to.

Cross-examined by Mr. MARKHAM:

Q. You have been sworn before in this case?

A. Yes, sir.

Q. Did you ever say anything about this figuring before in your testimony?

A. I think I did.

Q. Did you, in your testimony in Green Bay, say a word about any figuring being done?

A. I did, sir.

Q. I will read to you, and you can state if this was your testimony at Green Bay: "James S. Marshall was then called as a witness upon the part of the defendant, and being first duly sworn, tes-

tified as follows." (Counsel reads the record of testimony given by the witness from printed case.)

Q. Is that your testimony as you gave it then?

A. It is very near it. I think I would be as likely to know then whether I heard them figuring as now.

(Counsel read from the printed record the cross-examination by Mr. Markham.)

Q. When did you find out where Gillen was?

A. I don't profess to say I know where he was; I think he was in the front part of the store, looking out of the window.

Q. Do you swear to that as I have read it?

A. There is a good deal in there I never heard of till now.
68 I never heard so much of that cross-examination. Mr. Norris asked me two or three questions. There is a good deal there I don't recollect now. I did swear to what I supposed to be the truth at the time I made that statement, and I do now. The thing transpired precisely as I state it. I don't know whether the question was asked me then about the figuring, but I think it was. I recollect about the figuring about the price of pine; that is just what I recollect.

Q. I simply want to know if you have refreshed your memory now any more than you had then?

A. No, sir; not a bit. It was all done in one day. Hubbard went out once and came back again. They finished up at the second time. I think the last time he went out it must have been somewhere near noon; I could not tell exactly.

Q. When he came in first what time of day was it?

A. Along in the morning.

Q. How long was he gone when he went out?

A. Not but a very short time; I could not tell the exact time. It was in the forenoon he went away the first time; it was not in the afternoon when he came back. I don't think I stated at Green Bay it was in the afternoon. It is a thing that transpired a good while ago. I never have had my recollection called to it. I recol-
69 lect the question was asked Gillen in regard to pine. I think I must have made the statement at Green Bay as you have read it to me, that Gillen was called upon to know how much timber there was by my brother. My brother asked Gillen how much timber there was. He said he didn't know. He did not give him any estimate that I know of. He said he did not know.

Q. I call your attention to this answer: "I think I stood by the railing of the office. I could not say where Gillen was. I think he was around somewhere in the store; where, I don't know. I think my brother asked Gillen in regard to the amount of timber on the land. He said he had not given a close estimation—there might be three million, and might not." Did you say that? The question is, whether that is an answer that you gave on your examination.

A. I presume to say it is; it is so long ago; I don't know. I now say he did ask him. Gillen said he had not made an estimate so he could tell. I say it, as near as I can. As near as I can recollect,

he said he had not made an estimate so he could tell how much there was. I don't recollect of his making any such estimate of the exact amount as 3,000,000 feet. I don't know but he did. He hadn't made an estimate so he could tell the exact amount of
70 pine there was. I think I did make the statement that he hadn't made an estimate so he could tell.

COURT: Did you make in your former examination this statement that Gillen said there might be three million *foot* of pine on the land?

A. I understand by that, I said so; I don't dispute it; but as I understood Gillen at that time, and as I understand now——

Q. I only ask you to say what you testified to. Then you think you did?

A. I can't recollect the exact language he used now. I don't recollect all the circumstances connected with the sale. I understood they went to an office. I heard them say they were going over to an office to draw up some notes and fix the thing up. That is all I know about it. They mentioned Billings' office. At that time I did not know where Billings' office was at all. I knew it was in Green Bay somewhere, but I never had any business with him. I did not know then where it was.

Q. When they left the store to go to have the writings made, what time of day was it?

A. I think it was before twelve o'clock. Hubbard and my brother went from the office. As near as I can recollect, Gillen was not in the store at that time; didn't come back when they went away.

71 Q. Did any one go from the store by your brother's direction to call Mr. Hubbard back?

A. No, sir. Gillen went out after that. Whether he went out after Hubbard or not I don't know. He went out after he did. He turned in the same direction, right off down street, and I saw Gillen go off that way too. I did not hear my brother make a remark to Gillen at all. He spoke to me. I distinctly recollect that.

Q. If Mr. Marshall, your brother, the defendant in this suit, had spoken to Mr. Gillen you would have heard him?

A. I rather think I should. I didn't pay any attention to it, because I didn't think any further of it.

Q. Then your brother might have directed Gillen to call Hubbard back, and you may not have heard it?

A. He may have done it, but I don't think he could from the position in which he stood.

Re-examined:

I did not hear all the conversation that occurred between my brother and Mr. Hubbard; they were figuring there some time—I should think perhaps an hour; I did not hear all that conversation and what occurred between them while they were figuring together; I heard them set a price on stumpage of pine; then they went to figuring to see how much it would come to; the price was $2.50; I

didn't hear much of the conversation because I had to wait
72 upon customers outside of the office; what Hubbard said about what there was on the land was at a subsequent interview after he had been out and come in again.

Direct examination of L. M. MARSHALL resumed:

The only thing that induced me to buy this contract was Mr. Hubbard's guaranteeing there were three million of pine on it. If he had not guaranteed that I would not have bought it at all. I believed his statement. I relied on Hubbard's guarantee there were three million feet of pine upon the land; I bought relying upon his statement. By actual scale there was one million seven hundred and sixty-two thousand eight hundred and thirty-six (1,762,836) feet on the land.

Q. How much, if anything, did you lose by reason of the land not yielding the amount of three million feet of pine?

(Objected to.)

COURT: The theory of your defense is, as developed by your answer, that your loss was the shortage or deficiency at $2.50 a thousand. I do not know what other measure of damages there could be, except the value of that amount of timber which you say constituted the shortage; that might be either the contract value or the market value. It is for the jury to determine what the loss, if any, is, or what the damages are upon the actual facts that are disclosed; and I think the witness had better be confined to a statement
73 of the facts, and then let the jury, if they come to that question, figure the loss.

Exception by defendant.

WITNESS: The market value of pine was $2.50. I have known the market there for years. I have been dealing in that commodity for twenty years or more. That was also the rate at which Mr. Hubbard and I figured the value of the pine. I have not received in any form, from any party or persons, Gillen or Munroe or anybody, any sum for what I claim I lost by reason of the shortage on the pine. A year or so ago I suffered a slight paralytic shock, and my memory has not been as good, compared to former times, since then. Gillen was present at a portion of this interview preceding the contract. There was conversation between me and Gillen in the presence of Mr. Hubbard, as to the quantity of pine upon this land, before I went to consummate the bargain and while we were negotiating. Gillen, myself, and Hubbard were in the store. We were in the office, I think. I turned to Gillen and said: "How much pine is there on that land, Hubbard said there are three million?" and Gillen made the same reply he had before: He didn't know; he hadn't been over the land to estimate, but there might be three million and there might not.

Q. What reply did Hubbard make when you made that statement that Hubbard had said there were three million?

74 A. He kept silent. He neither affirmed nor disaffirmed. He was right there at the time. That was after Hubbard had made the statement to me as to the amount.

Q. Gillen and Monroe made no objections to your purchasing this contract and assuming the obligation to take the pine off it?

Objected to, as immaterial. Objection sustained. Exception.

WITNESS: No objection was made by any of the parties to my assuming this contract and taking the price. Gillen and Monroe knew of the fact I was negotiating to purchase. They took off the pine for me, acting as my agents. I directed them to do so.

Cross-examined:

Q. How long have you been in business in Green Bay?

A. Ever since 1851.

Q. How long did you know Gillen and Monroe?

A. I could not tell exactly the time I got acquainted with them. I think the first time Hubbard brought Gillen in and introduced him to me he was buying pine and putting up a mill; it was two or three years, it might have been four, before this.

Q. During the three or four years were you dealing with them in pine lumber and shingles?

A. Yes, sir; and they were manufacturing lumber and shingles at or near the same place spoken of in this transaction on the lands described. Monroe had a contract; he was not in partner-

75 ship with Gillen.

Q. You were aware when you purchased this contract, took this assignment, that it was relative to the same property they had been working on for two or three years, and you had been handling a portion of the time the lumber and shingles for them. You now understand it is the same place?

A. Yes, sir; I know nothing to the contrary.

Q. About what distance from Green Bay was that land and that mill spoken of by you in your testimony?

A. My impression is it is about 11 or 12 miles. I would not be positive as to the distance.

Q. And on the ordinary traveled road leading from Green Bay?

A. Part was; they had to turn off from the road to go to the mill.

Q. About what distance from the main road is the mill?

A. I should judge about three or four miles; I don't know; that would be my estimate of it.

Q. Is the land from Green Bay toward the mill more or less, and cultivated as farms?

A. Yes, sir; most of the way.

Q. What amount of shingles and lumber was in your possession at the time of this interview, spoken of by you with Hubbard at your store,—

(Objected to, as being immaterial, and not cross-examination. Overruled. Exception.)

Ques. cont'd. Belonging to Gillen and Monroe?

A. I could not tell without looking over my books. Not
76 knowing I should be required to tell anything of the kind, I have not posted myself up. I have a record of it on my books, but have nothing here to refresh my memory in regard to it.

Q. Was there a considerable amount of lumber and shingles in your possession at the time Hubbard called upon you?

A. Yes, sir; there was some we hadn't shipped; some out at the mill and some on the track had been delivered to us, and we had given our receipt for it.

Q. Are you able to state what shingles were worth per thousand at the time that Hubbard called upon you?

A. Not the exact amount, without looking at my books; it is several years ago; I don't keep market reports in my head for a number of years back; I have a record of it on my book; what I was paying and what I was selling them for I could not state now.

Q. You may state about, during the year 1874, the market price, if you recollect.

A. Between two and three dollars, somewhere; just the amount I could not tell; shortly after that they went below that; the price of common lumber that year was in the neighborhood of eight dollars; I think about the best lumber Gillen and Monroe were making there was something like twenty dollars.

Q. When Hubbard came to you, he was wanting you to
77 accept a draft, or check, order, or something on Gillen and Monroe; he wanted to get pay from you on his claim against Gillen and Monroe?

A. Yes, sir.

Q. Have you any idea what amount of money he was wanting?

A. No, sir; I sent for Gillen and Monroe to come in; Gillen did come in.

Q. At what time, either in conversation with Hubbard or Gillen and Monroe, did you learn what his demand in amount was?

A. I don't think I did the exact amount.

Q. Did you, at that time, learn there was an amount due from Gillen and Monroe to Hubbard?

A. Yes, sir; but the exact amount I could not tell you; he threatened to attach them, or something of that kind; the shingles were in my possession; I claimed they were mine; I don't remember hearing any statement about any lien; there might be and might not; I read what was in the contract.

Q. And when Hubbard informed you he wanted pay upon a draft or order, or something from Gillen and Monroe, you then sent for them?

A. I sent for Gillen—I sent for them both; they were at their mill; I think the same day that Hubbard called upon me and presented this claim; they might not have come in that day; Hubbard had been there some little time, and we had several
78 talks in regard to it; I think it was the same day that Mr. Hubbard made this demand; I sent out for him—in the morning, I think; I cannot positively state whether Gillen came in on that day or not.

Q. I ask you for your best recollection on that point. Have you not already stated that Hubbard, from the first, insisted upon great rapidity and dispatch about this matter, and that he came to your office or store in Green Bay and refused to give delay, and that he was only there twice?

A. That was the time we made the final contract—that I bought the contract.

Q. Have you, at one time, stated, on the trial of this cause, before, that he was only, in reference to this matter, at your store twice, and that during the same day?

A. I think I did state he was there twice; my recollection was at that time twice; he may have been more, but I cannot say in regard to it; I think he was in there two or three times that day—the day we finally consummated our trade.

Q. At his first interview with you, at or about what time of day was it?

A. I think in the morning.

Q. At the time he first came in the morning, do you recollect now who was in the store when he came there?

A. I don't.

79 Q. Do you recollect of any particular person besides yourself and Hubbard?

A. I think my brother was in the store when he first came in.

Q. And when Hubbard first came in did he make any other errand, or speak of any other business, except he wished to get some pay from you on his claim he had against Gillen and Monroe?

A. I think he spoke about selling me the contract, wanted to have me buy it at that time.

Q. Have you a distinct recollection of what he said about it on the first interview—in reference to your buying his contract; recollect what he said in reference on your first interview to your purchasing this contract?

A. Not all; only he made an observation I had better buy it; he was a good ways off; I could look after it better than he could.

Q. That was about the whole of it on the first?

A. Yes, sir.

Q. You refused to pay him any money?

A. Yes, sir; I did at the time.

Q. But immediately dispatched a messenger to the mill for Gillen, so as to be instructed in the matter as to what you should do?

A. Yes, sir; I wanted to consult with them.

Q. About what time after you were first called upon by Hubbard was it until he left; how long was he in your store at the first interview?

80 A. As near as I can recollect some little time; it might have been a couple of hours, it might have been an hour; then he went away; that is my recollection; I don't recollect of his going away with any one; my impression is he went away alone; I did not see any one go with him.

Q. Do you know how he happened to return to your store on the second interview?

A. I think Gillen asked him to come back; I have no recollection of asking Gillen to go for him to ask him to come back; I might, but I am not distinct in regard to that; I had some little talk with Gillen in regard to it; I think I asked him what I had better do in regard to it; he said he didn't know hardly what I had better do; he said I could do just as I had a mind to, that he did not want to advise me one way or the other about buying the contract.

Q. Did you then remark to him that he had better find Hubbard and bring him in?

A. I might; I am not sure in regard to that; I would like to have some further conversation with Hubbard in regard to it before I did anything.

Q. How long after the first interview was it before Hubbard returned to your store, and you had the second interview?

81 A. My impression is it was the next day; I think it took about all that day to get Gillen in; it is quite a distance out there, and a pretty hard road.

Q. At what time did Hubbard come to your store for the second interview?

A. That was in the morning, I think—that is my impression—about nine or ten o'clock.

Q. At what interview did anybody come with Hubbard when he came there?

A. I am not sure whether Gillen came in with him or not; I think Gillen was in the store while he was; I am not sure whether they came in together or not; I don't recollect whether any one came in with him; know he walked very slowly, and generally a man would not stop to walk with him, it took him so long to get across the store; he was lame with rheumatism.

Q. At this interview did he tell you how much his claim was against Gillen and Monroe?

A. I am not sure whether he told me at that time or not.

Q. At either of the conversations, or during the negotiations for tha transfer of this contract to you and these mortgages, were you informed of the amount of Stephen Hubbard's claim against Gillen and Monroe?

A. Yes, sir; I was.

Q. What was it in amount?

A. Something over ten thousand dollars; something over eleven thousand dollars, I think, the whole thing figured up.

82 Q. And for the purpose of taking Mr. Hubbard's contract into your hands, and those notes and mortgages, did you then and there announce to Mr. Hubbard that your object in making the transfer was for the purpose of aiding Gillen and Monroe?

A. Yes, sir; I did. After we had taken up our bargain and got it all consummated he remarked we would go to his lawyer's and let him transfer the contract.

Q. Do you recollect now that the very words you stated were uttered by Mr. Hubbard as you stated them, "We will go and have the transfer made"?

A. I am not sure of the exact language; it was something to that effect.

Q. Do you recollect there was anything said except you would go to a lawyer's office to have the writings made; was not the language used, "We will now go and have the writings made"?

A. It was something to that effect; something led us both to go there; I am not sure what exact time of day it was; it is a good many years ago; I should say it was in the afternoon, as near as I can recollect.

Q. Did any other person accompany Mr. Hubbard and yourself to the lawyer's office at the time you went to have the writings made?

A. I think not.

Q. Where did you go to have the writings made?

A. To Billings' office; Hubbard and I went there; Billings
83 wrote the assignment; I did not consult any attorney at all; it was all done by Mr. Billings.

Q. How long afterwards were the papers brought to you?

A. I could not state; it might have been three, it might have been six, months; they were left, in the first place, until he could consummate certain things, as he understood it, and then the papers would be delivered to me.

Q. And you took them?

A. Yes, sir.

Q. This assignment and land contract are the papers you speak of?

A. Yes, sir; and notes and mortgages.

Q. The papers were read over, I suppose, after they were written and signed, in your presence?

A. Yes, sir; I gave the notes and paid over the money that I was to pay in money; that was on the 23rd day of May, 1874, the date of these notes. From that time on Gillen and Monroe continued to cut timber, and manufacture it into lumber and shingles, at the mill aforesaid, as they had before.

Q. Without any immediate arrangement or change between you and them—for how long?

A. Until they cut up what timber there was on the land; two seasons, I think, they were cutting it up; the first season they commenced they didn't have much snow; the next season they cut up all what there was; I let them cut it off as my agents.

84 Q. You made no arrangement, in writing or otherwise, for two years after Mr. Hubbard assigned, or until the 19th of April, 1876?

A. We had no writings, and I continued to handle the lumber and shingles, allowing them so much a thousand for cutting.

Re-examined:

Q. Something has been said about Hubbard's claiming a lien upon those shingles or lumber. What do you know about that, or what is there about it?

A. I did not know he had any lien on them; the shingles were

put into my possession, and I had given a receipt for them to pay up Gillen's and Monroe's debts—what I had advanced them.

Q. Whose shingles were they?

A. Mine, and I had more than paid for them.

Q. Had the trade or transaction you had with Hubbard anything to do with those shingles, or what you would do or receive?

A. We did not take them into account at all; it entered into no part of the negotiation at all; I had a verbal arrangement with Gillen and Monroe to go on and cut off this pine land, and ascertain what there was upon it; I gave Gillen and Monroe directions to go on and cut off the pine, and keep correct account of what there was upon it, and report to me, which they done—manufactured it into lum-
85 ber and shingles at their mill. The lumber and shingles were delivered to me. I made these arrangements with them right away after I bought the contract. I do not recollect seeing Mr. Hubbard until he came to settle some time afterwards. There was one note paid; I had paid it to Hubbard. At the time I paid the first note they had not cut off the pine yet. The winter after I bought this we had no snow. They did not finish it up the first season. I told Hubbard I wanted to see Gillen and find out how they stood. He claimed they owed him a great deal. I didn't know anything about it. I wanted to consult him to see what I had better do. Hubbard understood, and so did I, that I wanted this land or pine for Gillen to cut up for the mill. That was talked between us. Gillen was to cut it up for me. Hubbard made no objection to that. He seemed to desire it should be done. He made the remark that he hoped they would come out all right. I told him I hoped so too, and I think they would if there had been three million feet of pine on it.

Q. Counsel says he thinks it was nothing to you whether they came out right or not; was it?

A. Yes, sir; a good deal.

Q. You say Hubbard in the first place came to you to get you to pay some money for Gillen and Monroe. What did he claim
86 your relations were with Gillen and Monroe and why did he come to you?

A. I don't know; he wanted me to pay it for Gillen and Monroe.

Q. Did he say why?

A. No, sir.

Q. Did he say anything about your having the lumber and controlling and managing it?

A. Yes, sir.

Q. What?

A. I don't recollect what he did say in regard to it?

Q. Did he seem to know you were to handle this lumber and pine and have the benefit of it?

A. Yes, sir.

Q. Before this arrangement was made?

A. Yes, sir.

Q. When did you first ascertain that the shortage existed—about what time?

A. When they got through cutting it off. In 1876, I think; during the winter of 1876.

Q. When did you first have any interview or talk with Hubbard about the shortage, if any?

A. When he came in to collect the pay for the last two notes; in my office in Van Dyke's store. When he first came in I think I had an account that he had guaranteed against Hugh Monroe—not Monroe, but Ballou; he was belting the mill; I had furnished him the belting and Hubbard had guaranteed to pay for it, and he figured up the interest on the notes; I told him about this account;
87 he handed me the note and I endorsed it on it; then he commenced figuring again; I told him there is another thing, the shortage on that pine, figure that up; then Hubbard jumped up, and got mad, and ran out of the office, and didn't say anything more about it; and he said he would sue me, or something of that kind, right off; I told him there was a large shortage; I wanted to have him make that up, as he agreed, and he refused to do it; I told him I was ready topay the balance of the note when he would allow me for the discrepancy on the pine; he didn't say much, ran out of the office as fast as he could; he refused to allow it.

Q. Have you had any talk since then about it?

A. I don't recollect whether we have or not; he never said anything to me, or I to him, since that interview, until the commencement of this suit.

Recross-examined.

Q. The guarantee for that amount you endorsed on the note for belting, he made no objection to that?

A. No, sir.

Q. Do you recollect what that amount was?

A. Nine hundred and some odd dollars; it is endorsed on the note.

Q. Was this at, or about, the time the last note was due—six, twelve, and eighteen months from March 22nd, 1874?

A. I think they were past due a little; that is my impres-
88 sion; I am not sure; I don't think he came there as soon as they were due.

Q. Can you recollect about how long after they were due he came for his pay?

A. I can't say.

Q. You have never mentioned this in court before, about this guarantee about the belts?

A. No, sir; I don't think I have.

Q. About what time did he make that guarantee to you to pay for the belts of Ballou?

A. At the time Ballou got it; I don't recollect the date of the transaction myself; I could tell by looking on the books.

Q. Were the notes due, or about due, at the time he made that guarantee for Ballou's belting?

A. No, they were not due; I don't know how long they had to run.

Q. How long did the debt run for the belting before it was endorsed on the notes?

A. It was some little time; I don't know exactly; it might have been a year, it might have been six months; I could not tell without looking at the books; it might have been only three months; I am not positive about that; at the time the guarantee was made by Hubbard, it was understood it should be applied on these notes.

Q. At the time the guarantee was made by Hubbard, was the amount of the guarantee named, how much it would be for?

89 A. I think he limited it to one thousand dollars; that he told me to let him have the amount af one thousand dollars.

Q. And you did?

A. It fell a little short of that; I let him have what he wanted up to that.

Q. That was the first time you ever intimated to him there was any shortage?

A. Yes sir.

Q. At the time you got that endorsement made?

A. Yes, sir.

Q. That was some two years and upwards after the time you took the transfer of the notes and mortgages?

A. It was the first time I saw him after I found out.

Q. That endorsement of the note was made in 1876?

A. The date I don't recollect exactly; I think some time in 1876.

Q. When you were sworn before on the trial of this case at Green Bay, in the State court, did you testify in the following words: "Hubbard stated to me at that interview that he would warrant that there were three million feet of pine timber upon the land described in the contract; that he would warrant it to be that, and that in case it fell short he would pay me back $2.50 a thousand," &c. Did you testify that was the agreement?

A. Yes, sir; that is a correct statement of what did actually transpire at that time.

Q. You have, as I understand you, at some time since the transaction, surrendered all your claim against Gillen and Monroe,

90 settled with them, lumped it up and let them go?

A. Yes, sir; they turned out all they could. I had a chance to sell the mill, and I told them if they would give me a bill of sale of the mill I would give them a receipt and let them go.

Q. Do you remember what amount you put in the receipt?

A. Five thousand dollars.

Q. Do you remember when that was?

A. I could not, without looking at the deed; it was on or about the 17th of April or the 19th of April, 1876.

Q. This agreement, as you state, was an oral agreement or talk; you had it all before you made any writings in reference to the guarantee, the talk at your store?

A. Yes, sir.

Q. About how long before the writings were made?

A. I think the same day.

Q. But a little while before?

A. Yes, sir.

Re-examined.

Gillen and Monroe were owing me ten thousand and some odd dollars, $10,916.25, at the time of the settlement in 1876; I had a settlement with them about April, 1876, at which time a receipt was given.

(Receipt identified and offered in evidence by defendant, and marked "Exhibit No. 3.")

I wanted to get possession of the mill; I only had it as a mortgage; I had to go to work and foreclose; I had a chance to
91 sell the mill; I wanted to dispose of it and get all I could out of it; they said they had nothing but the mill; I said, "You can call the mill what you have a mind to—five or ten thousand dollars; if you will give me a bill of sale of the mill so I can sell it, I will give you a receipt in full." There was a bill of sale executed.

Bill of sale identified, and offered in evidence by defendant, and marked "Exhibit No. 4." (Bill of sale dated April 19th, 1876, the same day as the receipt.)

Q. What was the mill worth you got from them in settlement, for which you gave them credit for $5,000.00?

A. I sold the mill to Woodruff for one million Star A shingles and five hundred thousand No. ones. They called the Star A shingles worth $2.50; they were worth $2.50 a thousand, and the No. ones a dollar; the aggregate was $2,500. The mill was not worth any more than that; we could not have sold it for that a year afterwards; I could not have sold it for cash anyway.

Q. Then, as I understand you, what you realized from this mill is the premises covered by the two mortgages you bought at the time you bought the land contract.

A. Yes, sir; I realized $2,500, and for that I released them from a debt of $11,000, nearly. That mill was covered by these two mortgages, and that was done to save the expense of foreclosure.

Recross-examined:

92 Q. When you say you settled everything with them, you have never yet taken any transfer of that land from any one, have you?

A. No, sir; it stands just as it was.

Q. The contracts outstanding in their behalf yet?

A. Yes, sir; it is a contract just as it was.

NICHOLAS GILLEN, sworn for def't, and testified:

Business for last ten years in lumber and shingles, lumbering and logging on pine lands. I know the land spoken of on which it is claimed there was pine; am one of the parties named in the contract of purchase from Hubbard, one of the firm of Gillen and Monroe; was present in the store in May, 1874, when they had a bargain or arrangement about selling this contract to Marshall. Marshall

told me Hubbard wanted to sell; I had not told him to go to Marshall to get pay for me; Marshall sold shingles for us, sometimes out and out, sometimes on commission; at that time we sold out to him I believe we sold to whoever we had a mind to. On the 23rd of May Marshall sent for me to come there (store); he wanted to see me. I was present in the store when Marshall and Hubbard were together; this was in the afternoon; Marshall asked me, in the presence of Hubbard, how much pine was on that land, and
93 I told him I did not know. Says he: "Hubbard says there is three million on there. I said: Maybe there is, maybe there aint, I can't tell. Hubbard did not say anything when Marshall said he had said there were three million feet; he kept silent. I knew they were negotiating in relation to the purchase of the land; they had been talking before that. After that Marshall went to the desk, and took a pen, and was writing, figuring, or something, and then I waited a little while. Hubbard went up, and said: "I will be damned if I will wait any longer for you," and started off. Marshall told me to go and see the old man; I started, and I met him on the stairs of Billings' office. I told Hubbard that I wanted him; I told him Marshall would be up there to see him; I don't know whether Hubbard went back or not; I went after him.

Cross-examined:

I heard Hubbard say nothing at that time.

HUGH MONROE, called by the defense, being sworn, testified:

I am one of the firm of Gillen and Monroe and know the parties to this action; have been over these lands mentioned in this contract several times.

Q. After Mr. Marshall purchased this pine from Mr. Hubbard, what was done on the land, if anything?

94 A. Nothing but take the pine off it. That was done. Peter Fagen did the logging. He logged two winters there. He logged altogether for us three, but one winter was before that. Two winters, or part of two. One whole one, and I guess prettty nearly all of the two winters. Fagen concluded his final lumbering of the land in spring of 1876. I showed Fagen the lands and the lumber to log upon.

Q. What had been your business for a number of years back?

A. Lumbering some; working in mills for a good many years.

Q. Have you ever had any experience in tracing lines?

A. I would not get lost in the woods.

Q. How many years have you had experience of that kind?

A. I have been out several times; maybe a dozen, maybe less. After Fagen had concluded his lumbering on these lands in this contract we went over the land together to see if the pine was all taken off, and found that the pine was taken off very clean; cleaner than any other piece of land.

Q. Was there any good, merchantable pine left standing on those lands after Fagen concluded?

A. No, sir; he took off a good deal that was not merchantable.

Q. You went over every particle of the land?

A. I think I did.

Q. How much pine, merchantable or otherwise, did Fagen take off? Did anybody else take any off?

95 A. Only what I took off after Fagen quit; I took off a few; the most what I took off was taken off the tops of old pine that had been chopped; I could not tell how long; I guess before Hubbard purchased it in the first place; I took off some logs; I can't recollect how many logs, it was not scaled; I may have taken off forty or eighty; they were not good, merchantable logs; they were refuse stuff.

Q. How much was taken off from the time Marshall assumed the contract and directed it to be cut off, up to the time you went over the lands to ascertain their condition; were the logs delivered to you?

A. Yes, sir; in the mill yard.

Q. Did you keep track of them yourself?

A. Yes, sir.

Q. What do you know about the logs, and how they were scaled, how the scale was kept, and how delivered to you?

A. Every log was scaled; the head scaler, James Parley, scaled some, and I scaled some. Then when we came to the final settlement between Fagen and us; I think there was about thirty thousand feet; there was some difference between Fagen's scale and ours, Fagen's was more; I was right there in the mill, filing and superintending the sawing; the logs were delivered and brought in; the winter of 1874 and 1875 Fagen put in according to the scale of the mill 1,462,277 feet, if I have kept that just exactly right off the

96 other book; I just took a memorandum; I had the book in Green Bay, and 5,200 feet of oak; In 1875 & 1876, 225,617; I could not tell how many more Fagen claimed; I don't recollect, but Fagen settled with us on our scale, and then when he came to call for the scale, Marshall came to call for the scale; I think I gave him Fagen's figures outside; I think I have known Hubbard since 1868 or 1869, as long as that; I bought the land first myself alone before Gillen came in with me; when I bought it first, I can't recollect just how I came to suppose he had it for sale; probably I wanted to purchase it; the next thing was to agree upon a price; I think that must have been in 1872; I think Hubbard wanted ten thousand dollars for it, and he told me there was about four million, or four and a half million, and I wanted to look the land over, and the next time I seen him I told him I would not like to buy it for four and one half million; I think I made the contract that there was about four million on it; I think that was the understanding as near as I can remember; he said he thought there was upon the land about four and a half million pine; he was willing to sell it to me for four; I think he did contract it for four million; I cannot tell positively now how much pine I took off the land after Hubbard had said

97 there was four million up to the time Marshall came into the transaction; I think Andrew Mattison was logging for me one winter; I think he put in five hundred thousand; I think the aggre-

gate must be somewheres about twenty-five hundred thousand; it was fully as much as that; it may be twenty-seven hundred thonsand; I can't tell exactly; I am only guessing at that now; it is only a rough estimate. When I bought the mill first I got logs off of that land, and was cutting them in that mill; Hubbard came, and I think I paid him some money there once, or more times may be; of course he had seen me cut the logs, and I supposed he knew they were coming off the lands purchased of him; I had no other land except that.

Q. Did not Mr. Hubbard know you were buying that land for the purpose of using that mill to cut up the lumber there was there?

A. I think that is stated in the contract.

Q. How often was he there during that time?

A. I could not tell; he had been there several times.

Q. Was not Hubbard a man that looked after his money pretty close?

(Objected to by plaintiff. Sustained. Exception by defendant.)

WITNESS: I could not tell how many times Hubbard was there; he came several times; sometimes he would stop at my house—once or twice; he was not there very often; if he came in the win-
98 ter time of course we were logging; if in the summer time, when the mill was running, we were sawing them up.

Q. Did he ever ask you how you were getting along, how much lumber you were making, or anything of that kind?

(Objected to, as leading. Sustained. Exception.)

Q. Can you remember any conversation, anything in relation to the logs?

A. No, sir.

Q. How long did you continue to operate alone before Gillen came in?

A. I think the mill burned down in 1873; it was then rebuilt; Gillen and I rebuilt it; I think Hubbard loaned Gillen some money to rebuild that mill and operate these lands.

Q. How much money did he let you have?

(Objected to. Sustained; and defendant excepts.)

WITNESS: I went over the land before I bought it originally; Hubbard did not go over it with me at that time.

Q. Did he go over the land with you?

A. I proposed to look over the land; I think I rode across on the old road once; I think that is the only time that I and Hubbard had been on the land together; I don't recollect whether this was just after or before we made the bargain; it was just about that time; Hubbard said then that he thought there was more pine than he had thought there was; this little piece we were going over had been lumbered off; he thought it was taken off cleaner than
99 it was; that is the impression I got that day; he thought there was not so much pine on the south half as there really was; he had underestimated it instead of over; that is the impres-

sion I got that day; he thought they could cut off four and one-half million.

Cross-examined:

The road went in just beside the mill and circled a little down across the section. It is a short cut. It crossed the whole section. It was an old logging road. It had been logged on where we went. There were other places where it hadn't been logged. I cut some of the timber before Gillen went in with me, and some afterwards; that is, had some cut. I have no knowledge of how much before. I don't remember exactly how much.

Defendant rests.

EDWARD KURTZ, being sworn, testified that he had cast the interest upon the notes in question in this case and found the amount due to be six thousand seven hundred and forty-three dollars and twelve cents.

Plaintiff's Rebutting Testimony.

STEPHEN HUBBARD, called by the plaintiff, being sworn, testified:

Before I went to Texas I resided in Manitowoc county, Wisconsin. It is five years last spring since I moved to Texas. Am
100 seventy-two years of age. I have lumbered some and farmed some. I lumbered some in Brown county and some in Manitowoc county, and farmed it in Manitowoc county. At the time of the transaction spoken of by Marshall my home was in Manitowoc county, and was living on a farm. Had lived on the farm about seventeen years, with the exception of what little time I spent lumbering in Brown county. I knew Gillen and Monroe. Have known Gillen all the time I lived in Manitowoc county; he lived in that county at the time; had a shingle mill there. The first I got acquainted with Monroe was when I was lumbering in Brown county. That must have been some twelve or fourteen years ago. I heard Monroe's testimony in this case.

Q. In reference to riding across the land with him, what do you recollect as to that transaction, if anything?

A. I had no idea of it until he spoke to me the other day about the matter, and then it refreshed my mind, I had rode across a corner of the land when I was up there going to his mill. I simply was going from my place to another one. We did not get out to look at pine land. I was lamer at that time than I be now; considerable. There was no reference to the quantity of pine at the time of the ride, or estimate of it. That was not the intention. I was on other business—to see him at the mill. Sometimes when I went up to the mill I called on him; sometimes I staid over night.

101 Q. You may state under what circumstances and for what purpose, and, as near as you can, what was said and done be-

tween you and Marshall at the first interview that he speaks of, if you recollect about it.

A. I went to his store for the purpose of having him give me a check upon the bank to have him pay me some money that I supposed belonged to me for one-fourth of the shingles that I then understood laid on his dock. He said he didn't like to give it now; didn't know as Gillen would be willing; he would send for Gillen, in the woods, and have him come up. He done so. Gillen came there, and I thought that Gillen was willing. I didn't hear no objections, but I didn't give no check; but I told Marshall that I had a contract, and it allowed me in that contract one-fourth part of the pay for the shingles to secure my payments, and I believe that I told him that the man that purchased them was liable to pay it to me, and he told me he was not purchasing, he was handling them. I told him I had a contract to that effect, it was over to Billings' office, a little way off, and he might go and see it, and see if it was so. He didn't go and see it, but sent for Gillen and Monroe to come up, as I have stated, and soon after that Marshall wanted to know how much I would throw off for prompt pay. I told him I would throw off fifteen hundred dollars. At that time I had offered Gillen to throw off a thousand if he would get some prompt man to keep
102 up the payments so the shingles would not be shipped off and I not get my pay. I was lame and old, and lived a good ways off. I don't know that Marshall knew that I had talked with Gillen before that. Well, it was delayed some little time. I was away from home, and didn't see any prospect of his giving me a check or anything else. I told him I would go to Billings' office and take some measures to get my pay or the shingles, my part of them. I started and went there; about the time I was going up stairs Gillen comes and says, "Marshall wants you to come back." I went back, and then we made the trade. We concluded on a trade and went up to Billings' office to have him put it in writing; Mr. Marshall went with me and it was put in writing. Billings did the reckoning to see how much the amount was on the demand I had against Monroe and Gillen and then deducted $1,500 from it. Billings done that according to our orders when we were present, made the writings, and they were signed and paid as agreed, except those two notes.

Q. I wish to call your attention to the statement of the defendant, L. M. Marshall, and also that of his brother, this statement that you guaranteed and warranted that there would be three million feet of pine timber upon the land described in the contract, if not, that you would pay them back for shortage $2.50 per thousand; whether or not any statement of that kind was made by you to them at that time or any other?

A. Nothing of that kind was ever stated or mentioned,
103 directly or indirectly.

Q. You may state whether or not you made any averments or statements to Mr. Marshall of your knowledge of what pine there was on the land in any way.

A. I did not, for the reason I did not know, and had no means of

knowing; I never inquired of any one; that was not my business there.

Q. You have heard Mr. Monroe's statement as to the conversation that you had with him about the sale of the pine upon the lands described in this contract, at a particular time when he was about to purchase them, and as to your being upon the lands at that time. You may state if you know anything about the transaction he detailed.

A. I don't know anything the contrary to what he testified.

Q. You may state, at the time you rode over the lands, what was the route, or what part of the land you rode over.

A. I don't recollect distinctly what part it was, and I never would have thought of it again if he hadn't mentioned it to me yesterday that we did go through a part of the land; I think, probably, what he said was true; I can't remember; it is a good while ago.

Q. Were you, or were you not, at that time making estimates, or looking for the quantity of pine at that time upon that land?

A. It was not my business there; I never estimated any
104 pine; I always gave so much an acre—a lumping bargain; I never sold any by stumpage, or never bought by stumpage, of any one.

Q. You have heard Mr. Marshall's statement here in reference to Gillen and Monroe's making some concession, or doing something with their property, to him. You may state whether or not, at any time, you did hear anything of that between Gillen and Monroe and Marshall or not.

A. I never heard anything of it at no time or place; no time.

Cross-examined by Mr. HUDD:

I presume I moved to Texas after these obligations sued on had all matured; I am not certain; I suppose the papers show for themselves; I had [a] conversation with Marshall before I went to Texas to live about this claim; this claim for shortage was made by him before I left the State; I had lived in Wisconsin about 16 or 17 years; I had bought two thousand acres of pine land in Brown county; when I bought it I wanted to lumber it myself; I bought it all with the intention of lumbering on it myself; I had a mill; I built one in Brown county; it must have been 10, 12, or 14 years ago when I bought this land; had owned it some years before I had anything to do with Marshall; I didn't know how much pine was there upon this land when I bought it; I had no means of knowing; I never had it estimated—never estimated it myself;
105 I went through the land, but I didn't know but very little about it.

Q. You say you bought it for the purpose of lumbering on it; didn't you know, or have good reason to believe, how much pine you were going to get off of it?

A. No, sir; that is the only time I had ever bought any land for lumbering purposes; I only knew how much pine there was on it, by going through it, and taking a view of it,—that is all the knowledge I ever had of it; I didn't know how to estimate it; I never esti-

mated it; I concluded there was enough on it to pay me for what I paid for it; I didn't traverse it very close; I went over it to get a general impression of the timber; examined it a very little; I didn't buy it without seeing it totally; I didn't know how much was on it; I could not tell by going over it; when I sold it first to Monroe, I didn't know how much pine timber was on it; had only a common judgment; I think, part of that I sold to Monroe, had been partly lumbered; I could not tell how much; I don't recollect who took it; somebody else took it by my order; I could not tell you how much I ordered taken off, nor the scale.

Q. Did you allow somebody to go on your land, without knowing what they took off?

A. No, sir.

106 Q. Can you arrive at what you had taken off before you sold to Monroe?

A. I could not figure it up; have no means of telling; there might have been three million, or six, or less; I did not keep track of it; kept no books nor account with the men; could not tell how many men I did have settlements with for logging; one winter I cut 700,000; I never got any off this particular land; I don't think any came off that piece of land; I don't know how much was on the land when I sold it to Monroe; I told him, I thought likely there was four and one-half million, but I had no means of knowing; don't think I told Monroe there was four and one-half million on that land; I may have told him, after we drove through, it looked to me as though there might be more than I had thought there was.

Q. You, in the first place, said four and one-half million; Monroe wanted an examination, and said he thought there was not over four million; you finally assented to call it four million?

A. I don't recollect it; I expected Monroe wanted to lumber it; I knew it by reputation; I expected it; I may have known it; I knew he was taking logs off it, of course.

Q. Did not you know, for two or three seasons, Gillen, and then Gillen and Monroe were lumbering off this same land, stocking their mill?

107 A. I didn't keep no exact account of it; they were lumbering some there; they know better than I do; I could not state that I know such and such things about it; I believe I was at the mill once or twice when they were operating it; I staid there over night sometimes while they were operating the mill; didn't expect they had any other land to get logs from; don't know how much shingles and lumber they cut there the three seasons before Marshall came in; don't know the capacity of that mill; have had a mill myself; I bought them an engine; I don't know what the size was; the engine cost one thousand dollars; I recollect I paid one thousand dollars for it; it was some ten years ago; I think it was not an overly large one; that is all I know about the capacity of the mill; I don't know how much they cut.

Q. From your experience in such a mill, how much would it average a day?

A. It depends upon how hard it is drove.

Q. Twelve hours a day, the usual hours?

A. It is easy to ascertain that fact from the men that run the mill; I don't profess to know about that particularly; the mill first there when I sold to Monroe burned afterwards; then it was rebuilt; they built it themselves, I think, excepting that thousand I put in; I don't recollect of putting in only that; I knew the fact of their rebuilding the mill, and going on, and still logging and cutting
108 the lumber up on this land; that was before Marshall came into the transaction at all.

Q. When you sold to Gillen and Monroe, or contracted to sell to them, you contracted to sell all those lands mentioned in the contract for nine thousand dollars, was not it $9,880.00?

A. I expect that is the amount the contract says.

Q. How much was paid you on that contract before you had your negotiations with Marshall?

A. I don't recollect.

Q. Have you any way of telling?

A. I recollect there was one eighty of land that was in Monroe and Gillen's contract that they took the lumber off from, and I bought it back from them; I think that I allowed them four hundred dollars, and I think that was endorsed on the contract.

Q. Any other payments made to you on the contract?

A. I don't recollect of any other.

Q. How did you come to go to Marshall, as you say you did, in relation to some payment to be made to you?

A. As I had not had any pay for shingles, as the contract reads I had some right to one-quarter of them; I understood there was a lot on the dock ready to be shipped; I thought I would go and see if I could get my part of the lot before they were shipped; that is what called me there; it was the same day of this contract
109 that he bought of me against Gillen and Monroe the same day; there were two interviews on the same day; I spoke to him first in regard to a check, and he didn't like to give it, because he didn't know as Gillen would be willing; he sent for Gillen, and I waited until Gillen came there.

Q. Did he send twelve miles out to the mill and have Gillen there in the afternoon?

A. Yes, sir; he brought Gillen there that day; had the papers drawn at the lawyer's office in the afternoon; I don't know but I staid there over night; my interview with Marshall was about nine or ten o'clock in the morning; then Gillen came and our transaction was not closed until after he came there; it was all the same day; the mill is 12 miles from Green Bay—only a wagon road there; interview with Marshall in the morning when I first went there was very short, not an hour.

Q. Did you make any bargain, say anything about any negotiations or dealings or particulars of your trade in the first interview?

A. No, sir; I wanted him to give me a check for the shingles, for my part of them; I didn't ask it for all of them; I wanted him to give me a check for the money I owned in that pile of shingles; the contract was to that effect, and it was in Billing's office; that is

what I said to him; I told him that I in this contract had a
110 right to one quarter of the shingles; I understood he had the shingles; I wanted him to give me a check; I didn't say anything about a settlement, nor give him an explanation; Marshall said that he didn't like to give a check, didn't know that Gillen would be willing, and sent for him to come up; we rested then until Gillen came; I think that was all that was said; nothing was said about my wanting to sell the contract to Mr. Marshall, nor about how much pine there was on the land, nor what stumpage was worth; I was not in there probably a great while; I probably went out; I don't think I staid in the office all the while when they sent for Gillen; I was there when he came; that is the most I recollect; I waited around there until he came; might have been more than twenty minutes; could not tell the time; it was afternoon before Gillen got there, and before we made this bargain; I saw Gillen when he came.

Q. What was then said and done after Gillen arrived?

A. About that time Marshall wanted to know how much more I would throw off for prompt pay.

Q. Had you been talking about throwing off before?

A. I had not.

Q. What had he reference to—throwing off more?

A. How do I know? I might explain my opinion about it if you want me to.

111 Q. Mr. Marshall asked you how much more you would throw off?

A. He said how much would I throw off.

Q. What did you say then?

A. I told him I would throw off fifteen hundred for prompt pay.

Q. This, you say, was the second interview, when the trade was consummated.

A. That was after Gillen was sent for.

Q. Where was Gillen standing then?

A. I don't know as he was present.

Q. Was anybody else present but you and Marshall?

A. I don't recollect anybody else.

Q. After these two conversations what happened then?

A. The last was, I said I would throw off so much. He didn't make me no prompt answer whether he would do it or not. It dallied along a little while, and I didn't see as anything was going to be done. I was not going to get my pay for my shingles, nor was he to take me up at the offer. I started, then, to go and get some papers at Billings' office, as I have told you before, to secure my payment for the shingles. I had a right to one-quarter. I don't recollect of anything else.

Q. How long was this interview before you went out?

A. It was not a great while; I could not tell exactly. It was very short. That is all I recollect now. As I was going to Billings' office Gillen said that Marshall wanted me to come back, and I went back.

112 Q. Are you sure that Gillen told you Marshall wanted you to come back?

A. I understood him so.

Q. Didn't Gillen tell you Marshall would meet you at a lawyer's office upstairs?

A. I don't think he did.

Q. You heard his testimony?

A. I don't recollect that. I know I went back by his order; then I went back; found Marshall. I don't recollect any one else. Gillen was in and out. I don't recollect seeing James Marshall. Then Marshall inquired of Gillen in regard to this pine, how much there was on there, and, as I understood Gillen, he made the remark, "There is enough to saw two years." I think Gillen made the remark, "There is enough to saw two years." Marshall says, "Two years?" Gillen says, "Well, two seasons." That is all the inquiry I have ever heard about the pine that is now in question to my recollection now. I stood right opposite of him. He said it to Gillen. Afterwards I made this bargain with Marshall. I don't recollect there was anything more material said. Then we went out and had the papers made.

Q. Do you say that these three conversations you have given between you and Marshall was all that occurred between you before the bargain was ended?

A. I don't recollect any other conversation now.

113 Q. Let me see if I give it in substance: First, you went and asked for a check or pay for your shingles. As you understand, by that contract you were entitled to a certain amount of them that was refused, and Gillen was sent for?

A. Yes, sir.

Q. When Gillen came there Marshall asked you what you would throw off for prompt pay; you said fifteen hundred, and there was a little delay and dallying there, and you said you were dissatisfied and started out for a lawyer; you were then invited to come back; you came back, and Marshall asked Gillen how much pine there was on the land, and Gillen said he thought there was enough to cut two seasons, and that was all.

A. That is all I recollect of; that was not all the bargain I had with Marshall.

Q. Where did you make any other bargain?

A. Right in the store, made a bargain and went and drawed the writings. Don't know as I had any other conversation or any other talk than what I have repeated at those three interviews; made the bargain in the office, and then went to Billings' office to make the papers; I don't recollect of any other conversation.

Q. Was any other language used to make that bargain than what you have detailed?

A. He agreed to take the contract and pay me so much for it.

Q. Was anything more said in making this bargain than you have already testified?

114 A. I don't recollect anything more was said, anything more than we made the bargain.

Q. Was anything else said about the details of the bargain than you have testified to?

A. I don't recollect anything else; I don't recollect of anything at all.

Q. How much was he to pay you for this contract?

A. He was to pay me the face and interest on it after deducting $1,500.

Q. When did you make that agreement?

A. At the time before we went to make the writings.

Q. What was said about the way in which you were to be paid?

A. I could not tell you to-day exactly; the papers show how he was to pay me; we drew the papers, according as we made the agreement, in the office.

Q. Did Marshall sign any papers except the notes?

A. I don't recollect.

Q. Don't you know he did not sign any papers except the notes?

A. I don't recollect he did; only the notes.

Q. Do those notes contain the details of this bargain?

A. Yes, sir; they are part of it.

Q. Anything more than the ordinary form of promissory notes?

A. I presume not.

Q. Did the notes contain any part of this agreement or bargain, excepting to state the amount and time of payment?

A. I don't recollect.

115 Q. When did you have your agreement how the payments were to be divided?

A. In the office.

Q. What was said about it?

A. He agreed to take it; he agreed to do so and so; he agreed to take it.

Q. You have not stated how long a time he had to pay you in.

A. I don't recollect; the writings was made just as we agreed; we used language to agree about it; I could not state the language exactly.

Q. Who proposed the payments should be so much in cash, so much in six, twelve, and eighteen months?

A. I think he took his own way.

Q. Did he tell you he wanted it fixed in that way?

A. I think so; I don't think I set the time.

Q. Where was that done?

A. In the office; everything in the bargain was closed up at the office before we went to the lawyer at all.

Q. How much did he say he would pay you cash?

A. I don't recollect now.

Q. Do you recollect how much he did pay you in cash?

A. I don't remember; he paid what he agreed to.

Q. What was said about his having an assignment of the contract, if anything; what papers were to be drawn?

A. He was to have an assignment of the contract, and that was the bargain we had in the store all through, and we went and

told Billings, both parties, how the bargain was, and he
116 drawed the papers accordingly.

Q. Did you talk about anything as to those notes as to the time they should run and the rate of interest?

A. I think the rate of interest was agreed upon.

Q. Anything else talked about it?

A. I don't recollect anything else.

Q. Did you sell him anything else beside pine land?

A. Yes, sir; one quarter-section of land with the pine on it.

Q. I am not talking about that; did you sell him anything else beside land and pine on the land?

A. Two mortgages on the mill.

Q. Have any talk about it; anything said about those mortgages?

A. I expect we had.

Q. What was said about those mortgages?

A. I believe he was to have them; I had them; I told him I had them; I wanted to sell the whole thing.

Q. Did Marshall know you had these mortgages, or did you make that proposition?

A. I told him I had them.

Q. How did you come to say anything about them?

A. It was in the bargain; we talked it all over in the office.

Q. You said a moment ago that nothing else was said.

A. I have said we made our bargain and went up there, and the contract was made just as we made the bargain, and it was.

Q. What was your bargain about the mortgages?

117 A. He was to have an assignment of them.

Q. What was the amount of them?

A. One was for one thousand dollars and the other one was given for about twelve hundred, before the mill burned. I think they were in the office, and that Billings went and looked them up.

Q. When did Billings go and look them up?

A. When I went to his office one time.

Q. Was not he looking up those mortgages long before you went there to draw papers to get them ready for this transaction?

A. It may be.

Q. You had some talk with Marshall about the mortgages long before you went in there?

A. No, sir. I don't know as he was looking them up; I saw him in the office one time looking over the mortgages.

Q. Did you have any memorandum of them?

A. I don't think I had; I told Marshall I had mortgages on the mill.

Q. Did you describe the amount of them?

A. I tried to.

Q. How long they had run, what was paid on them?

A. Yes, sir.

Q. It took you some time to tell that?

A. No, sir.

Q. You did not do it from memory?

A. Yes, sir.

Q. No memorandum?

A. There might have been some endorsement on the mortgages; I don't know.

Q. Two mortgages; quarter section of land, with the pine
118 on it, and other pine on other land; was there any other part of your bargain talked of?

A. I believe that was all.

Q. Are you sure of that?

A. I can't recollect anything else.

Q. In this conversation you had with Gillen and Monroe it included eighty acres of land not in the contract you sold to Marshall; you specially reserved that; did you reserve that without any talk or agreement with Marshall; did he know anything about your reserving that?

A. I have testified once here that there was an eighty of land on section 11 that was in Monroe and Gillen's contract, and they got the lumber off of it and had no use for it, and I could sell it better than they could; I took that eighty back; I think the price was four hundred dollars; I gave them credit on it on some of the mortgages or obligations they gave me and paid off before this transaction.

Q. Did they give you a deed?

A. Yes, sir; before.

Q. A deed to release it from the contract?

A. Yes, sir; a release.

Q. Did Marshall know anything about it?

A. I suppose he did.

Q. How do you suppose he did?

A. I think it was all talked over; the whole thing.

Q. Did you talk with Marshall about exempting eighty acres out of the operation of that contract?

A. I think I did; I must have done it

119 Q. What did you say to him about it?

A. We reserved that out, because that had been paid for once.

Q. Now, you remember you talked about reserving that out?

A. Yes, sir.

Q. You didn't remember it a little while ago?

A. I suppose it was all in one bargain.

Q. It took some time to talk about all these things?

A. Yes, sir.

Q. When this case was tried at Green Bay didn't you testify nothing was said about this reserved land; you didn't know how it happened it got into the papers at all?

A. I don't recollect.

Q. Will you swear you didn't testify to that?

A. I can't say; I did not testify to anything wrong; I could not say that I did.

Q. Do you say you did not?

A. I say I don't I think I did; I don't recollect swearing to any

such thing; I recollect that was out of the bargain; I didn't sell him anything I did not own at all; I didn't intend to.

Q. Did Marshall ask you how much pine there was upon this land you wanted to sell him?

A. He never did ask me.

Q. Do you remember his having a conversation with Gillen, as Gillen has testified to, in relation to it?

A. Yes, sir; I heard him ask Gillen.

Q. What did you say?

A. Nothing.

120 Q. You heard him ask Gillen, what Gillen has testified to, and you made no response?

A. I said nothing.

Q. Why?

A. Because I didn't know anything about it.

Q. Could you have such conversation, and such testimony as Gillen gave, and not contradict it if it was not true; were you willing that Mr. Marshall should believe it?

A. What testimony?

Q. You heard Gillen's testimony?

A. Yes, sir.

Q. You said it all occurred as he testified?

A. Yes, sir.

Q. Were you willing he should make such a statement in your hearing and not contradict it?

A. I didn't contradict anything; I didn't know; I had no right to.

Q. You heard all that was said?

A. Heard that.

Q. You didn't contradict it; you made no objection?

A. No, sir; I did not say anything.

Q. You were willing that Mr. Marshall should take that statement as true, and for it to influence him in that matter; were you willing he should be influenced by it; did not you think it would help your trade?

A. I did not think anything about it; I was not anxious to sell to Marshall; I didn't go there for the purpose, never thought of it at all; he mentioned it to me.

Q. Had not you been trying to make this sale to him some time before?

A. No, sir.

Q. Was not Mr. Marshall and you, for nearly an hour in
121 the morning, standing at his desk figuring up this land, and what it would amount to at $2.50 the three million feet you represented on the land?

A. I never sat at no desk at all figuring about it. If he figured it was unbeknown to me. I don't think there was any figuring done, unless it was private from me. There was none done to my knowledge.

Q. You heard the testimony of James Marshall. He says that L. M. Marshall told you he didn't want to buy it in that way;

he wanted to have a man sent out to estimate it. You were not willing anything of the kind should be done; you wanted to close up the trade. Your word was good—by God, there was three million feet of pine upon that land?

A. There was nothing of that kind said.

Q. He said he asked you for an estimate—to estimate it?

A. He didn't ask me that.

Q. You heard James Marshall's testimony?

A. Yes, sir. That never came up; not a bit of it.

Q. Did not you say there was three million feet of pine on the land?

A. No, sir; for I did not know.

Q. Why did not you know?

A. Because I didn't go through it. I never, after I sold it to Gillen and Monroe, knew anything about it afterwards.

Q. You were willing that Mr. Marshall should think there were three million feet of pine on it?

A. If there was three million I was willing to take it. If there was not I was not to blame, for I didn't make any decision
122 upon that subject. I didn't know anything about it.

Q. Did not you try to induce Mr. Marshall to enter into that negotiation with you then and there? You would listen to no time for delay?

A. No, sir; I did not.

Q. Didn't you tell Marshall that unless he secured you the ten thousand dollars that you would levy on those shingles? Did not you so testify at the trial at Green Bay?

A. Yes, sir.

Q. "I did tell Marshall unless he secured me that ten thousand dollars I would levy on those shingles?"

A. I don't recollect I said the ten thousand dollars; but if he didn't secure me the shingles I was going to levy on the shingles.

Q. "I did tell Marshall unless he secured me that $10,000 I would levy on the shingles?"

A. I might have told him so.

Q. If you did, what was your object? Was not it to induce him to close out his bargain?

A. No, sir; I did not want to sell particularly.

Q. You think you may have said so from the testimony?

A. It may have been, but I don't think I did. I went to get the pay for the shingles; that makes me think I didn't go further with it.

Q. You say there was no conversation on his part or request to go and look over the land before the bargain was closed up?

A. Not to me by any body?

123 Q. And you say there was no figuring?

A. I didn't see no figuring. I have testified now to everything that was said at these several interviews that I recollect of.

Q. Might not some things occur you don't recollect?

A. It might be so.

Q. In relation to this 80 acres that was excepted or reserved from this contract, I want again to call your attention to your testimony

on the trial before. Didn't you testify you didn't know how that came in the assignment, there was no talk in the store about it?

A. I might; I don't recollect about it now.

Q. Was it the truth?

A. I didn't testify to anything only the truth.

Q. Is it the truth now?

A. I don't know but I testified just as I do now in regard to it. I have testified to it as I think it was.

Q. "How did it come that with your contract with Gillen and Monroe you were to deed two separate tracts of land, and when you came to make your contracts with Marshall you reserved one of those tracts and only deed him a quarter section?"

Ans. "I think they lumbered it off, then they bought it back on a contract to me. I sold the land and took it in payment towards what was due on the contracts; after they had lumbered it all they wanted to I took it back and sold it to another party—the naked
124 land." "I dont know as there was anything said to Marshall about it in the store. I don't know how it came to get into this assignment here. If it was in the contract it was put into the writings." Didn't you so testify in Green Bay?

A. There must have been something said about it in the store.

Q. Was that your testimony in Green Bay?

A. I don't recollect; the whole thing was talked in the store, and the writings drawn accordingly; the whole thing was talked; I may not have remembered all the points, but the writings were drawn just as we agreed in the store, and the land was put in; if it hadn't been talked it would not have been put in.

Q. In your assignment to Marshall you reserved the right to foreclose this land contract in your own name?

A. I don't recollect.

Q. You signed that assignment, didn't you?

A. Yes, sir; I suppose I signed it.

Q. Where was the agreement or talk or conversation between you and Marshall as to your right to reserve the privilege to foreclose that contract yourself?

(Objected to. Sustained. Defendant excepts.)

COURT: Read that clause. Mr. HUDD reads: "And the said Stephen Hubbard does hereby sell, set over, and assign unto the said L. M. Marshall all his right, title, and interest in and to a certain
125 contract executed and entered into by and between the said Stephen Hubbard, Nicholas Gillen, and Hugh Monroe, which said contract is dated on the 23rd day of April, 1873, the said Stephen Hubbard hereby reserving the right to foreclose and enforce the covenants contained in said last-mentioned contract, in his own interest and behalf in case of default in the payment of either of three certain promissory notes executed this day by L. M. Marshall aforesaid to Stephen Hubbard, in the sum of," &c.

Q. What was that contract, bargain, or agreement made between you and Marshall?

A. I don't recollect a thing about that now.

Q. Was there any talk of that kind?

A. I don't recollect about that at all.

Q. Was that talked of at the store?

A. It must have been at the store at the time we made the bargain. I never talked the bargain anywhere else.

Q. You had forgotten that until I called your attention to it?

A. I had forgotten I had that reserved, of course I had.

Q. How did you come to make that bargain with Marshall?

A. In the first place he opened the subject that I never had thought of asking me how much I would throw off for prompt pay.

Q. You must have talked with Mr. Marshall in regard to your having the right to foreclose the land contract in your own name?

A. Probably I did.

Q. Can you state what you said and what he said about it?

126 A. I could not tell, of course, if it had not been in the conversation it probably would not have been in there. I had forgotten it was in there.

Q. I understood you to say a little while ago that Marshall forced this conversation as to buying; you were not very anxious to sell?

A. I didn't think of it.

Q. You didn't care to sell?

A. Not at that rate.

Q. Why were you willing to throw off fifteen hundred from your claim?

A. I hadn't had pay for shingles from the time that Monroe and Gillen started to run until that time that I recollect of. I don't recollect of any, and they were shipping out. I didn't want to go up there every little while to see about shingles, and made that offer to close it up and have no more trouble with it; that was the idea, I had no other idea.

Q. How did you arrive at $10,050.30, which was the amount that Marshall was to pay you? How much was the land put in at?

A. I don't think it was separated particularly.

Q. How much were the two mortgages put in at?

A. I believe twenty-two hundred. I don't know, but there was some endorsement on them reckoned out.

Q. Were not the mortgages figured at their face and inter-

127 est at so much, and then you sat down and figured three million feet of pine, $2.50 a thousand, which made just the amount, with the amount of the face of the mortgage, to equal $10,050?

A. No, it was not figured in that way; it was a lumping trade; I throwed off fifteen hundred, and the lawyer deducted from the contract that much; there was no figuring; the lawyer done all the business; I didn't look into it at all.

Q. I understood you to say all the bargain was made before you went to the lawyer's.

A. The bargain was made, and we went and told him, and he made the writings accordingly.

Q. How much did you bargain with Marshall to pay you on the notes and mortgages?

A. What the contract reads.

Q. How much for the land?

A. The land was not separated.

Q. Nothing was said about the value of the land separate from the others?

A. No, sir.

Q. Do you know how much your claim was against Gillen and Monroe?

A. No, sir; not at the time.

Q. Do you know now?

A. No, sir.

Q. The $10,050 was arrived at in what possible way?

A. It was for the consideration of that contract, lacking $1,500.

Q. Then the contract must have amounted to how much?

A. I did not figure; the lawyer figured it.

Q. $1,550.30 the figures show on it.

128 A. I could not tell you; I did not figure it; the contract shows for itself.

Q. Nothing said about the eighty acres—what their value was taken off it?

A. That was arrived at.

Q. It had some value, hadn't it; was Marshall allowed anything on that?

A. I don't know as he had anything to do with the original contract that was to go to Gillen and Monroe; that was reserved out of the contract I made with Marshall.

Q. Then you did not throw off quite fifteen hundred; you had the benefit of $400 besides, didn't you?

A. I guess not.

Q. Where did that go to?

A. I think that was endorsed on some of the obligations of Gillen and Monroe; whether on the mortgage or notes they know better than I do; they had credit for them—for the eighty acres of land.

Q. For about $2,100, which the mortgages were estimated at, and the right on your part to reserve 80 acres, and the deed to Marshall 160, he was to pay you $10,050.30?

A. I think that was the amount.

Q. In the court, in the trial at Green Bay, when I asked that question of you, did not you say that as to the 21 hundred dollars, and as to reserving 80 acres, and all that sort of thing,

129 you knew nothing about it except what was contained in the writings; that was the only place it was to be found; was not your answer "I expect so, if the writings state it there; I don't know anything about it aside from the writings"?

A. I presume likely.

Q. You did so testify?

A. I don't know now particularly; I never figured it myself at all.

Q. Did not you testify, in Brown county court, that the bargain was not made at the store, but where the writings were made—at the lawyer's office?

A. I don't recollect that I did.

Q. Did not you testify as follows: "That is not the way we got at it; I think they got at it in some particular way; my lawyers done it; you must ask them about it; I did not say the bargain was all agreed, made, and figured out at the store; it was when the writings were made; I always go and tell my lawyers, and they do all the figuring and make the writings, and all that I have to do is to sign them, and this was done in the same way." Did not you so testify? You did nothing about the figuring; went and told your lawyer about it, and the figuring was done?

A. I think the bargain was made at the store, and my lawyer did all the writings; as I understand it, there was no bargain made after I got up to the lawyer's office.

130 Q. "I didn't say the bargain was all agreed, made, and figured out at the store; it was when the writings was made; I always go and tell my lawyer-, and they do all the figuring and make the writings, and all I have to do is to sign them."

A. I don't recollect about testifying to that; I testify the same now—that the bargain was made in the store; I wish to be so understood; there was no particular bargain made there—only to close up the writings, and the lawyer done all the figuring.

Re-examined:

When we went to the lawyer, myself and Marshall, in presence of one another and of the lawyer, stated over what our bargain and contract was, the lawyer reduced our bargain, as we stated it to him, to writing, and done all the figuring just as we had agreed on; I think the writings was made right; I never discovered anything why they were not all right; I would not be very precise, but my impression is, Marshall's office was as you went into the front door; when Gillen came to Green Bay, I think he came right to Marshall's office, and I was there, or about there, to see him; I think I went in with him; I think I met him right there; I think it was afternoon some time; when I wanted Marshall to give me a check for

131 my part of the shingles, he didn't want to give a check on the ground he didn't know as Gillen would like it, so he sent for Gillen to come up, and I waited for him to come.

Q. I wish to call your attention to your conversation with Marshall at the time you called to get the check, and at the time the conversation occurred that the counsel on the other side has read to you, in reference to your getting your pay, and getting your claim secured, unless certain things should happen; if this clause in the contract was the clause you referred him to at the time you spoke of the one-fourth interest you had in the shingles; I read in the contract between folios 129 and 131: "And the said parties of the second part (that is, the land contract between yourself, Gillen, and Monroe, that you assigned to this defendant) further covenant and agree that one-fourth of all the moneys for the sale of the lumber and shingles manufactured and sold shall be held by the purchaser or purchasers of the same to be applied in the payment of the installments that shall become due next after said sale, or so much

thereof as shall be necessary to make such payment." Was that the clause in the contract you referred Mr. Marshall to?

A. Yes, sir; I told him I had a contract of that kind, and it was all in Billings' office right there handy by; I think I told
132 him that the purchaser was to pay over one-fourth of the money; I don't know as I told him it was in the contract, but that is what I told him; and he said he was not buying them, he was handling them; I told him where the contract was, he could see it, it was at Billing's office; I did not go to see the shingles; I had understood there was a large amount there; if I found it proper, I was going to try to secure my money on the shingles, that is what I thought of, what I was concluding to do, not have them shipped off, and I never get my money; that is the way I felt about it.

Q. You say that there was in that mill, upon which the notes and mortgage were given to you by Gillen and Monroe, a boiler; do you know of your own knowledge what the value of it was at the time that this transfer was made?

A. I don't know as I do; I bought the engine, paid one thousand dollars for it; it was new; it was worth that; I don't know as I ever examined the mill very closely; I was pretty lame, and could not go through it very much; I don't recollect as I ever examined it close enough to know so very much about it.

Q. Do you know what the value of the land that was in this contract that Marshall took the assignment of was worth without any pine on it?

133 A. I considered it five dollars an acre, 160 acres; I sold it [at] that price, all of my land I had there, two thousand acres, excepting one eighty I sold for six, and earlier I let a man have it at $2.70; I let a couple of men that lumbered have some for almost nothing, but all the land I have sold went for five dollars, and some at six.

Q. At the time that Marshall took the assignment of this contract —the one that had the clause in it, I have read you as to the lumber and shingles—do you know whether, or not at that time, there were logs and lumber at the mill in the process of manufacture, or for that purpose, that were taken off from this land?

A. I don't know much about that; they would know better themselves.

Q. You have heard Mr. Marshall make a statement, in reference to a meeting between himself and you, at a time when some endorsement was put on his note, by way of a debt about belting that was bought by Gillen and *and* Monroe; can you give the time; do you recollect the time and place when that occurred; I made a mistake in the name, Ballou had some belting that you paid for?

A. I think it was in his office, but I don't recollect the time; the notes will tell if you have them.

Q. Do you recollect it to be at the time of the endorsement of the $900 on the note?

A. I don't recollect whether it was or not.

134 Q. Was anything said at that time, by Marshall to you, in reference to the claim for shortage upon pine?

A. I think that was the time; I know he said something to me about it at that time, it was in the "Bay;" that was the first and only time; but I didn't understand it all from him at that time; he told me he could prove from his clerk that I agreed to make up so and so, and it was in Green Bay, but he didn't tell me at that time how much there was to make up, and I learned the other particulars at the court.

Q. I want to know, if you can recollect it, state it, what you heard Marshall say, in reference to this shortage, at the time of this endorsement of nine hundred dollars?

A. He said something to me about it, that he could prove by his clerk, that I agreed to make up some certain amount of shortage; I could not tell the exact figures he made, he had the amount made some way; he said he could prove by his clerk, but didn't say at that time how much it was a thousand, or I didn't understand him at that time how many thousand he claimed; he said at that time, he could prove by his clerk, that is all I understood at that time; when they came to the court, then I learned by the parties that it was so many thousand stumpage and so much a thousand; that was the first I heard of that, was in court, and the other particulars I
135 have stated, that he claimed his shortage, and could prove by his brother so and so; it was two different times and places it came to me, that idea from Marshall.

Q. Did Marshall claim an agreement—you should pay him some shortage?

A. Of course he claimed some shortage; said he could prove it by his clerk; but at that time he told me he had the contract from Billing's office and was going to keep it. I told him he could be compelled to produce it; and furthermore, I told him he had nabbed the contract; got the pine and got the machinery out of the mill and would not pay his notes. I don't know as he made any reply. I didn't stay a great while to argue a case of that kind. I don't recollect whether that was the time the $900 was endorsed. I can't recollect what day it was. I know I paid for the belting. I could not tell what time that was paid for.

Recross-examined:

Q. What was done with that part of the land that, under certain contingencies, you agreed to convey; that northwest quarter of section 12?

A. Not anything. Have not deeded it to any one, nor offered to do so, nor taken off the timber. Don't know if the timber is on it still. Don't know whether I reserved the oak timber on it or not.

Q. You reserved the whole title; you didn't contract to
136 sell this land unless you were paid?

Objected to. Sustained. Exception.

WITNESS: Never offered to deed it to Marshall. It lies there as it always did.

Q. You made no disposition of the title of it?

Objected to. Sustained. Exception by def't.

Q. You never have waived the forfeiture, have you? Have you ever expressed to Mr. Marshall that you waived the forfeiture?

Objected to.

COURT: He has testified that he holds the land just as he did. I think that covers all.

Exception by def't.

Pl'ff rests.

The above and foregoing embraces all the evidence given on said trial. At the request of the plaintiff, and after argument, the court then directed a verdict for the plaintiff in the sum of six thousand six hundred and ten dollars and thirty-six cents; to which direction the defendant duly excepted.

Defendant, by his counsel, thereupon makes and files a motion for a new trial upon the minutes of the court; which motion, after hearing by the full bench, the circuit judge then presiding at said term, was denied; to which decision and rnling the defendant duly excepted.

And because none of the said exceptions, evidence, and decisions of the said judges do appear upon the record of the said trial;
137 therefore, on the prayer of the said defendant, by his said counsel, the said judge hath to this bill of exceptions set his seal according to law and the practice of this court, this 19th day of June, 1882.

CHAS. E. DYER, *Judge.*

EXHIBIT NUMBER 1.

For and in consideration of ten thousand and fifty-eight & $\frac{30}{100}$ dollars, to me in hand paid, I, Stephen Hubbard, of Manitowoc county, Wisconsin, do hereby sell, set over, and assign unto L. M. Marshall, of Green Bay, Wis., a certain mortgage executed by Hugh Monroe to said Stephen Hubbard on the first day of March, 1872, upon real estate in said mortgage described, together with the notes therein referred to, one of said notes having an indorsement thereon of five hundred dollars, and which said mortgage is recorded in volume 18 of Mortgages, on page 591, in the office of the register of deeds of the county of Brown. To have and to hold the said mortgage and the debt thereby secured to the said L. M. Marshall, his heirs, executors, and assigns, forever. And I do also sell, set over, and assign unto the said L. M. Marshall all my interest, right, and title in and to a certain mortgage executed by Hugh Monroe to Nicholas Gillen on the first day of March, 1872, which said mortgage was recorded in volume 18 of Mortgages, on page 590, in the office of the reg-
138 ister of deeds of the county of Brown, the interest of said Stephen Hubbard being expressed in an assignment from said Nicholas Gillen to said Stephen Hubbard on the 21st day of June,

A. D. 1873, which said assignment is recorded in the office of the register of deeds of Brown county, in volume 22 of Mortgages, on pages 17, 18, and 19. And the said Stephen Hubbard does hereby sell, set over, and assign unto the said L. M. Marshall all his right, title, and interest in & to a certain contract executed and entered into by and between the said Stephen Hubbard, Nicholas Gillen, and Hugh Monroe, which said contract is dated on the 23rd day of April, 1873, the said Stephen Hubbard hereby reserving the right to foreclose and enforce the covenants contained in said last-mentioned contract in his own interest and behalf in case of default in the payment of either of three certain promissory notes executed this day by L. M. Marshall aforesaid to Stephen Hubbard in the sum of two thousand five hundred and seventeen dollars and fifty-eight cents each, and further excepting and reserving out of said contract the west half of the northeast quarter of section number eleven (11), in township number twenty-two (22), range twenty-one (21) east, and upon the payment of the said three notes the said Stephen Hubbard is to convey the northwest quarter of
139 section number twelve, in town number twenty-two range twenty-one east, as in said contract covenanted. This assignment of the mortgage and contract herein described, being upon this express condition: that the said three promissory notes executed by said L. M. Marshall to the said Stephen Hubbard in the sum of two thousand five hundred seventeen and $\frac{58}{100}$ dollars each, due respectively in six (6), twelve (12), and eighteen (18) months from date, be paid when matured, then this assignment to be valid; but in case of default in the payment of said notes, or either of them, then this assignment to be void and of no effect, said mortgages & contract, in the meantime, to be left in the custody of Billings & Huntington, attorneys, in Green Bay, Wisconsin.

In witness whereof, I have hereunto set my hand and seal, this 23rd day of May, 1874.

STEPHEN HUBBARD. [SEAL.]

In presence of—
H. J. HUNTINGTON AND L. J. BILLINGS.

EXHIBIT No. 2.

This arrangement, made and concluded this 26th day of April, A. D. 1873, by and between Stephen Hubbard, of the county of Manitowoc and State of Wisconsin, party of the first part, and Nicholas Gillen and Hugh Monroe, of the town of New Denmark, Brown county, in said State, parties of the second part, witnesseth:

That the said parties of the second part hereby agree and
140 bind themselves and legal representatives to pay, or cause to be paid, to the said party of the first part, his heirs or assigns, in the sum of nine thousand eight hundred and eight ($9,808.00), in the manner following: In twelve equal annual payments or installments of eight hundred and seventeen and $\frac{33}{104}$ dollars each, to wit: The first payment to be made on the first day of August, A. D. 1873,

and one payment of eight hundred and seventeen and $\frac{33}{100}$ dollars every three months thereafter until paid, to wit, on the first day of November, 1873, on the 1st day of February, May, August, and November, 1874, on the 1st day of February, May, August, and Nouember, 1875, and on the 1st day of February and May, 1876; the said payments to be made to the party of the first part or to his order, and the same being intended to apply, when fully completed, as the purchase-money of the following tract, piece, or parcel of land, to wit: the west half of northeast quarter of section number eleven (11) and the northwest quarter of section number twelve (12), all in town number twenty-two, range number twenty-one east, excepting and reserving to the said party of the first part all the white oak timber standing, lying, & being on said west half of the northeast quarter of section eleven (11) aforesaid, and also to apply as the purchase-money of the pine timber and the whole thereof now standing, lying, and being on the south half of section number twelve (12), in town number twenty-
141 two, range number twenty-one (21), aforesaid, which said pine timber is to be cut and taken off in accordance with contracts heretofore made in the sale of said land, and also before the time has run on tax titles; and further, said payments are intended as the purchase price of the pine timber and the whole thereof now standing, lying, or being on the east half of the northwest quarter of section number eighteen, town twenty-two, range twenty-two east, and on the west half of the southeast and the east half of the southwest quarter of section number eleven, town twenty-two, range twenty-one east, all of which above-described lands are situated in the county of Brown, Wisconsin.

The said parties of the second part hereby agree and covenant that all the pine timber that is cut on said lands is to be manufactured at the mill now being built on the old site of the mill formerly owned by Hugh Munroe, in the town of New Denmark, in said county.

And said parties of the second part further covenant and agree that one-fourth of all moneys for the sale of the lumber and shingles manufactured and sold shall be held by the purchaser or purchasers of the same, to be applied to the payment of the installments that shall become due next after said sale, or so much thereof as may be necessary to make such payment.

142 It is hereby understood, covenanted, and agreed by and between the parties thereto that the title to all of said property is to be, and remain in, said party of the first part until the payments of said principal sum and interest shall be fully made. The said parties of the second part further agree and covenant that will pay all taxes, special or general, which may be assessed on the west half of the northeast quarter of section number eleven and the northwest quarter of section number twelve, town number twenty-two, range twenty-two, aforesaid, from and after the date hereof, whenever such taxes shall become due and payable by law, until the aforesaid purchase-money be fully paid in the manner above stated, and also to hold said premises from the date hereof as

the tenant at will or sufferance of the said party of the first part, subject to be removed as tenant holding over by process under the statute in such case made and provided, whenever default shall be made in the payment of any of the installments of purchase-money above specified, and also to keep the buildings, fences, and improvements on said premises in as good repair and condition as they now are, except ordinary wear and decay and damages by the elements. The said party of the first part hereby agrees and binds his heirs, executors and administrators that in case the aforesaid sum of nine thou-
143 sand eight hundred and eight dollars, with the interest, shall be fully paid at the times and in the manner above specified, he will relinquish all right, title, or claim to the timber standing, lying, and being on said lands, except the white oak timber above expressly excepted, and will, on demand thereafter, cause to be executed and delivered to the said parties of the second part, or their legal representatives, a good and sufficient deed in fee-simple of the west half of the northeast quarter of section eleven and the northwest quarter of section twelve, all in town twenty-two, range twenty-one, in Brown county and State aforesaid, free and clear of all legal liens and incumbrances, except the taxes herein agreed to be paid by the parties of the second part and the white oak timber expressly excepted.

And it is distinctly agreed and understood by and between the parties hereto that if the said parties of the second part shall fail to make any of the payments of purchase-money above specified, at the time and in the manner above specified, in such case this arrangement shall be utterly void and all the payments thereon forfeited, subject only to be renewed by the act of the party of the first part or the mutual agreement of both parties.

And it is further understood and agreed that all the pine timber on the east half of the northwest quarter of section 18, town 22, range 22, and west half of southeast quarter and east half of
144 southwest quarter of section 11 and south half of section 12, town 22, range 21, to be cut and manufactured into shingles and lumber before any is cut on the west half of northeast quarter of section 11 and northwest quarter of section twelve, town 22, range 21, aforesaid; and it is further covenanted and agreed that all the pine logs and timber now lying and being in, upon, and about the mill yard of the parties of the second part, and which are cut and hauled from section 12, town 22, range 21, shall be subject to all the conditions of this agreement.

It is hereby mutually agreed that the interest to be paid by said parties of the second part on the purchase-money hereinbefore mentioned shall be at the rate of ten per cent. per annum, and to be due and payable annually on the whole amount unpaid.

In witness whereof, the said parties have hereunto set their hand and seals, the day and year first above written.

STEPHEN HUBBARD. [SEAL.]
NICHOLAS GILLEN. [SEAL.]
HUGH MONROE. [SEAL.]

In presence of—
G. KUSTERMANN.

EXHIBIT No. 3.

GREEN BAY, *April 19th*, 1876.

145 Received of Hugh Monroe & Nch. Gillen the sum of five thousand dollars, in full of all accounts and demands up to this date.

L. M. MARSHALL.

EXHIBIT No. 4.

Know all men by these presents, that we, Hugh Monroe and Nick Gillen, of the town of New Denmark, in the county of Brown and State of Wisconsin, of the first part, for and in consideration of the sum of five thousand dollars, lawful money of the United States, to us in hand paid by Linus M. Marshall, of the city of Green Bay, in the county of Brown and State aforesaid, of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey unto the said party of the second part, his heirs, executors, administrators, and assigns, the following-described goods, chattels, and personal property, to wit, one saw and shingle mill building, together with all and singular the saw and shingle machinery therein, consisting of one steam engine, boilers, smokestack, & fixtures, and one Valentine shingle machine and fixtures, and one hand shingle machine & fixtures, & one double circular saw and fixtures, and all beltings, shafting, & saws in the said mill building, & all other tools, machinery, & fixtures now in and belonging to said mill, which mill &
146 fixtures are situated & being in & upon the following-described real estate in said Brown county, Wisconsin, described as follows, to wit, all that certain piece or parcel of land situate, lying, & being in the county of Brown & State of Wisconsin, & particularly described as follows, to wit, the northwest quarter of the southwest quarter of section number seven (7), in township number twenty-two (22), range No. twenty-two (22); and the said party of the second part is hereby authorized to enter upon and to remove said mill building & machinery from said real estate & premises, by himself & servants, at any time he may see fit, on or before the expiration of twenty years, & without let or hindrance from the parties of the first part or assigns. This agreement is subject to all mortgages heretofore given upon said real estate.

To have and to hold the same unto the said party of the second part, his executors, administrators, and assigns, forever; and we do, for ourselves, our heirs, executors, and administrators, covenant and agree to and with the said party of the second part, his executors, administrators, & assigns, to warrant and defend the sale of the said goods, chattels, & personal property hereby made unto the said party of the second part, his executors, administrators, and assigns, against all and every person and persons whomsoever.

147 In witness whereof, we have hereunto set our hands and seals, this 19th day of April, A. D. 1876.

HUGH MUNROE. [SEAL.]
NIC GILLEN. [SEAL.]

Signed, sealed, and delivered in presence of—
JNO. W. HAGERTY.
ORLO B. GRAVES.

JULY 1, 1882.

This day came the defendant, by his attorneys, and filed his bond in the sum of ten thousand dollars, with A. G. E. Holmes and Henry Strong as sureties, conditioned to prosecute a writ of error to effect, and answer all costs and damages if he shall fail to make good his plea, which bond is approved by the district judge, and is as follows:

Supersedeas Bond.

Supreme Court of the United States.

STEPHEN HUBBARD *vs.* L. M. MARSHALL.

Know all men by these presents, that we, L. M. Marshall, A. G. E. Holmes, and Henry Strong, all of the city of Green Bay, State of Wisconsin, are held and firmly bound unto Stephen Hubbard, of the State of Texas in the sum of ten thousand dollars, to be paid to the said Stephen Hubbard, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and
148 each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, dated this 17 day of June, 1882.

Whereas the above-named L. M. Marshall hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the seventh circuit and E. district of Wisconsin:

Now, therefore, the condition of this obligation is such, that if the above-named L. M. Marshall shall prosecute his said writ of error to effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall remain in full force and virtue.

L. M. MARSHALL. [SEAL.]
A. G. E. HOLMES. [SEAL.]
HENRY STORNG. [SEAL.]

Sealed & delivered in presence of—
VAN BUREN BROMLEY.

E. DISTRICT OF WISCONSIN, } ss:
County of Brown, }

Henry Strong & A. G. E. Holmes, being duly sworn, doth each severally say that he is worth the sum of ten thousand dollars,
149 exclusive of property exempt from execution and his debts.

HENRY STRONG.
A. G. E. HOLMES.

Subscribed & sworn to before me, this 17th day of June, 1882.
VAN BUREN BROMLEY,
U. S. Commissioner, E. D. of Wisconsin.

Endorsed: This bond is approved. July 1, 1882. Chas. E. Dyer, judge.

Whereupon it is ordered by the court that execution be suspended, and a writ of error and citation issued, and a copy of said writ of error lodged for the defendant in error.

150 United States Circuit Court.

STEPHEN HUBBARD *v.* L. M. MARSHALL.

DYER, J. (orally): The court has, perhaps, upon the trial of this case, adopted rather a liberal rule in admitting evidence that has been objected to, but I think the course of the trial has very well illustrated the importance of getting at all the facts, so that the court and jury might be able to understand just what is the position of the parties in the transaction in dispute.

The suit is brought upon promissory notes executed by the defendant to the plaintiff. The action was brought originally in the State court, and the defense there made was, that the consideration of these notes was the transfer of certain property by the plaintiff to the defendant, which property consisted of certain notes and mortgages which the plaintiff held against Gillen and Monroe, and also a certain land contract which was subsisting at that time between the plaintiff and said Gillen and Monroe, and it was alleged that the plaintiff, in making this sale and transfer to the defendant, guaranteed that there were upon the lands
151 covered by the contract spoken of three million feet of merchantable pine timber; that this guaranty had not been satisfied; that there was a large deficiency in the amount of pine which the land produced, and that in consequence there was a partial failure of the consideration for the transfer from the plaintiff to the defendant. The case was tried in the State court upon the issue presented by that defense, and that trial resulted in an allowance to the defendant of a sufficient amount to cover the alleged partial failure of consideration. The case was afterwards appealed to the supreme court of this State, and is reported in the 50th volume of Wis. Reports, on page 322. The judgment of the court below was reversed by the supreme court upon the ground that the contract between the plaintiff and defendant for the transfer of this property was in writing, and that, as the alleged guaranty was verbal, it could not be shown as a defense in the action.

The case came back to the State court and was removed to this court. The defendant then applied for leave to amend his answer. This application was opposed, but was granted by the court. In the amended answer there was set up the same guaranty that had been set up in the original answer, but in addition thereto there were other allegations to the effect that this so-called
152 guaranty was a representation that there was a certain amount of pine upon this land; and that the representation was fraudulently made to induce the defendant to make the purchase. And so by the amended answer the defense became this, that the plaintiff, to induce the defendant to make the purchase on notes and mortgages and the land contract, falsely and fraudulently represented to him that there were three million feet

of merchantable pine timber upon the land covered by the contract; that he knew the representation to be false, and so that a fraud was practiced upon the defendant, to his injury, to the extent that the land did not produce the quantity of pine timber which had been represented to be upon the land by the plaintiff when the contract was made. The defense therefore was converted into one of fraud.

The case has now been tried in this court, the testimony has been closed, and counsel for plaintiff asks the court to direct the jury to render a verdict for the amount of the plaintiff's claim. The case is now to be considered by the court upon that motion or request.

Something has been said as to the propriety of having allowed the defendant to interpose this amended answer, and the criticisms of counsel upon the action of the court in granting leave to so amend are not without force, for I am free to admit that if the court
153 could then have looked into the case as it is now able to do it might have seriously hesitated to allow this amendment to be interposed at this stage of the case. Undoubtedly the defendant must be held to have known, when he interposed his first defense, which was based upon the alleged oral guaranty, all the facts and circumstances which attended his transaction with the plaintiff as well as he knew them at the time this amended answer was presented; and there is force in the argument that it was the duty of the defendant, if he desired at any time to interpose the defense of fraud, to have done it at the time he originally answered the complaint. But the order has been heretofore made allowing this amendment; it is a matter that is past, and I do not see that the court can now review it, or that it can here take into consideration the correctness or the error, whichever it may be, of the order that was heretofore made giving leave to amend the answer.

The answer is in such form that undoubtedly the defendant is enabled again to raise the question in this court whether (independent of any fraud) a guaranty was made by the plaintiff at the time this contract was entered into, of the quantity of pine upon the land; and testimony has been offered, and has, under objec-
154 tion, been admitted, in support of that ground of defense.

The question has therefore arisen, and has been much discussed, as to whether that is a tenable ground of defense; and the learned counsel for the defendant has seriously attacked the soundness of the opinion of the supreme court of this State in Hubbard *v.* Marshall, 50 Wis., on that question. I have heretofore indicated my concurrence in that opinion, at the same time stating that I would further consider the question; and I have, with as much care as possible, given it further consideration. Several authorities have been handed me by counsel for the defendant as bearing upon the question which I have looked into. There is, perhaps, in view of the previous decision of the supreme court of this State in the case of Hahn *v.* Doolittle, reported in 18th Wis., 196, and in view also of the opinion of the same court in the case of Jones *vs.* Keyes, 16th Wis., 562, some ground for the criticism which counsel for the defendant indulges in upon the opinion of that court in the case of Hubbard *v.* Marshall, *supra*. It is, however, to be observed that Mr.

Justice Lyon, in the opinion last mentioned, after referring to the case reported in 12th Metcalf, says that parol evidence is undoubtedly competent to show a total or partial failure of the consideration of a note or other written contract. The court in its decision
155 states a distinction between a case where only part of the contract is reduced to writing, or where it is sought to contradict a mere receipt, or where it is attempted to show a consideration different from that expressed in the writing, or to prove an oral agreement of the parties, if the writing does not profess to state it, and is made merely for the purpose of passing title pursuant to the agreement, and a class of cases where the terms of the agreement between the parties appear to be clearly expressed in writing, and the writing contains nothing from which it might be inferred that the parties did not intend to incorporate in it the contract just as it was made, and the whole of it. The court do not in this opinion, as I understand it, dissent from those cases in which it is held that an oral agreement may be shown if the writing does not profess to show it, but is made merely for the purpose of passing the title pursuant to the agreement. And they hold that the contract of assignment in this case, by virtue of which this property was transferred to the defendant, is something more than an instrument which merely passes the title. They say that its terms appear to be clearly expressed, and that it contained no clause from which it can be implied that the parties did not intend to incorporate in it the
156 contract just as it was made, and the whole of it.

As I have had occasion before to say, if this contract were nothing more than a mere assignment, if it were nothing more than an instrument which passed the title, if it contained no special clauses indicating that other matters about which the parties were contracting were embraced in the instrument, then it would be a case within the rule of Hahn *vs.* Doolittle, which was a case of a simple assignment passing the title to the note and mortgage which were transferred. But this instrument of assignment provides, among other things, that upon certain contingencies the plaintiff Hubbard shall convey a certain portion of this land. It declares that the assignment of the mortgages and contract are made upon a certain condition, to wit: That the notes executed by Marshall to Hubbard shall be paid when they mature; further, that in case of default in the payment of the notes, this instrument shall be void and of no effect; and that the mortgages and contract shall be deposited in a certain place for safe-keeping. And, therefore, while the decision of the supreme court in the case of Hubbard *vs.* Marshall is not absolutely binding upon this court, yet, I am persuaded, that it expresses the law upon this question.

One of the other cases to which my attention has been
157 called is Pugh *vs.* Davis, 96 U. S., 336. In that case this is what the court say: "It is an established doctrine, that a court of equity will treat a deed, absolute in form, as a mortgage when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction, and when it is shown to be one of security, and not of sale, it will

give effect to the actual contract of the parties. As the equity upon which the court acts in such cases arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. This cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument. There it may be shown that the deed was made to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face. The object of parties in such cases will be considered by a court of equity."

That is what the court says upon that question. They are construing the exception to the rule, which permits proof that a
158 deed, absolute in form, is in fact a mortgage, and then they reiterate the familiar principal, that it may be shown that a written instrument was made to defraud creditors; and that is but a reiteration of the principal which we are applying in this case, in one phase of it, namely, that you may show all of the preliminary negotiations of the parties, for the purpose of determining whether one of them was induced by fraud to enter into the contract.

What I have just read from the 96 U. S. is repeated in Brick *vs.* Brick, 98 U. S., 516.

The case of Canal Company *vs.* Ray, 101 U. S., 522, which has been cited, holds simply that the terms of a contract under seal may be varied by a subsequent parol agreement.

The case of Hicks and Wife against Jennings, 4 Fed. Rep., 855, is to the effect that where several tracts of land are sold under one contract, and separate deeds naming a distinct consideration are given for each tract, fraud and want of consideration in the sale of one tract can be set up as a defense in a suit to foreclose a purchase-money mortgage upon another of such tracts.

Without pursuing the question further, I conclude that the opinion of the supreme court of this State upon the question should be accepted as stating the law.

159 The court is asked by the plaintiff's counsel to direct a verdict in this case on the ground that the defense of fraud is not established; that such proof in support of that defense is not made as justifies the court in submitting the question to the jury. Some doubt has been expressed as to when and under what circumstances this court will give a peremptory direction to the jury to render a verdict one way or the other. Upon this subject a well-established rule prevails in the Federal court, a rule different from that which prevails in the State court, since, as counsel are aware, it has been often held by the supreme court of this State that if there is any evidence, however slight, to sustain the verdict, then the verdict must stand. The Supreme Court of the United States have given us a clear path upon which to travel when this question arises, and it is: That Court, in the case of Pleasants *vs.* Fants, 22 Wallace, 122, first speaking of the duty of the court in its relation to the jury, says: "In the discharge of this duty it is the province of

the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor, not whether, on all the evidence, the preponderating weight is in his favor; that is the business of the jury; but
160 conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict? If it is not, then it is the duty of the court, after a verdict, to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which the plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of the plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd; and accordingly we hold the true principle to be, that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so the jury."

Now, as I have said, the defense here is, that the defendant purchased from the plaintiff this land contract, which previously the plaintiff and Gillen and Monroe had entered into, and which bound the plaintiff upon the payment of certain sums of money at certain times, to convey the land and the pine timber upon it, and also certain pine timber severed from the land, to Gillen and Monroe, and which transfer to the defendant included certain notes and mortgages which the plaintiff held against Gillen and Monroe;
161 and it is alleged that, to induce the defendant to buy this land contract and these notes and mortgages, the plaintiff fraudulently represented to him that there were three million feet of merchantable pine timber upon the lands covered by the contract; that this representation was false, and that afterwards it was ascertained, by cutting the timber off the land, there was a large deficiency, and that, consequently, the defendant has sustained damage by reason of the alleged fraudulent representations.

Now, there are certain elements of fact that must be shown to have existed to entitle a party to succeed in such a defense. In the first place, it must be shown that the representations were made; in the second place, that the representations, if made, were fraudulent; in the third place, that the defendant relied upon the representations; and in the fourth place, that he had a right to rely upon them. Those are four material elements of fact that must enter into the case.

It has been argued that the proof here is totally inadequate to show that the representations, if any were made, were fraudulent, and I must say there is one item of testimony which came from the defendant himself which tends pretty strongly to show that there
162 was not fraud in the transaction. That was the statement that while the plaintiff did represent to him that there were three million feet of merchantable pine on the land, he said, also, that if it should prove not to be so, he would make good the deficiency. If that statement was made by the plaintiff at the time, as thus testified to by the defendant himself, it would seem to be a strong cir-

cumstance tending to take out of the representations their alleged fraudulent character. However, the court would strongly hesitate, in view of all the proof that is in upon this question of fraud, before it would take that question, or either of the four questions of fact that I have stated, from the jury. But there are certain other elements of fact which necessarily enter into this defense. Not only must the representations be made, not only must they be fraudulent, and not only must it appear that the party relied, and had a right to rely, upon them, but it must also be shown that the representations were material to the contract or transaction which took place between the parties; and, further, that injury has been sustained, damage has resulted to the defendant from the alleged fraudulent representations. These are as essential as any of the other elements of fact which must be shown in establishing such a defense. I repeat, that it must appear that the defendant has sustained
163 damages which are charg-able to the alleged fraudulent representations, and for which, therefore, the plaintiff is legally responsible; and it is an important question in this case, and not one free from difficulty, since the case is somewhat peculiar.

The plaintiff did not sell to the defendant the land and pine timber described in the Gillen and Monroe contract. We have to start out with that as a primary proposition in the case. He simply sold and assigned to the defendant that contract. Gillen and Monroe were the purchasers under the contract of the pine and land, and the title to the property remained in the plaintiff. Now, if the case were one where the plaintiff had sold to the defendant the land and pine thereon, and had made representations as to the quantity of pine so sold which were false and fraudulent, as an inducement to the purchase, there would be no difficulty in perceiving the materiality of the representations to the contract and in tracing the resulting injury to the fraud. But, as I have said, the defendant simply bought the contract, that is, bought Gillen and Monroe's obligation to the plaintiff, and upon making the purchase the defendant stepped into the shoes of the plaintiff to the extent that the relations which had previously existed between the plaintiffs and Gillen and
164 Monroe under the contract were concerned. Thereafter it is evident that, in the absence of anything changing those relations, Gillen and Monroe became the debtors of the defendant. This being so, and as the interest transferred to and vested in the defendant by virtue of his purchase did not embrace the land and pine upon the land, but only Gillen & Monroe's obligation to pay for the land and pine, it seems clear that no injury could result to the defendant from representations as to the quantity of pine upon the land, for which the plaintiff would be responsible, unless, at the time the alleged false representations were made, it was contemplated and understood, with the knowledge of the plaintiff, that Gillen and Monroe were to surrender and give up the contract of purchase on their part, and that the defendant was to take their place with reference to the land and pine, so that, after that, the defendant's interest should be an interest in the property itself, and not simply an interest in Gillen and Monroe's obligation to pay for the property.

As I have stated, if this were a sale by the plaintiff to the defendant of the lands and pine, there would be no difficulty, but that is not what the plaintiff sold to the defendant. He sold Gillen and Monroe's obligation, and it comes at last to the question, Is
165 there such proof made of an understanding between the plaintiff and defendant, and Gillen and Monroe, at the time of this transaction, that Gillen and Monroe should be relieved of their obligation under this contract, and that the defendant should take their place, so that he should have the land and the pine, as justifies the court in letting the case go to the jury? If this is a vital point in the case, and if there is not such proof made as authorizes the court to submit the case to the jury upon that question, then the case must be disposed of by the court as involving substantially a question of law.

It is argued that this contract had become forfeited, that is, the contract between Gillen and Monroe, and the plaintiff became in May, 1874, absolutely void, because the notes of Gillen and Monroe were past due and were unpaid. It is the language of the contract that on failure to pay at the time prescribed the contract shall be deemed forfeited and void. That, it is true, was the agreement of the parties, but on the 24th day of May, 1874, the plaintiff still treated this contract as alive and in force. He did not exercise his option to declare the contract forfeited, and at an end as to
166 Gillen and Monroe. And there is a very important clause in this contract to be taken into consideration, which is, that upon the payment of the said three notes given by Marshall to Hubbard, the said Stephen Hubbard is to convey the northwest quarter of section No. 12, town 22, range 21 east, as in said contract covenanted. There is a distinct recognition of the Gillen and Monroe contract as in force, notwithstanding the fact that Gillen and Monroe were not making prompt payments, and the plaintiff, by the act of assigning the contract to the defendant, treated it as a subsisting and valid contract. It is said that if the plaintiff had brought suit against Gillen and Monroe they could have set up this alleged fraud. Undoubtedly that is so, because they had bought the land and the pine, and the representations were with reference to the quantity of pine on the land.

The testimony as to any arrangement between the plaintiff and defendant and Gillen and Monroe at the time of the alleged fraudulent representations is substantially this, that the defendant had a previous arrangement with Gillen and Monroe, by which they were to go on and cut off the timber; and he says that he gave them leave to go on and cut off the timber and account to him, and they did so. He says, in the same connection, that he does not
167 recollect seeing the plaintiff again until he came there to settle this claim, but that the plaintiff understood that he, the defendant, wanted to cut the timber off this land. That may be true, but still all this does not come up to the point of showing that it was understood by the parties, at the time of this transaction, that the defendant was to step into the shoes of Gillen and Monroe, so that he was to have the land and pine, or their interest in it. And

it seems to me that considering this evidence most favorably for the defendant, it cannot be said that Gillen and Monroe's rights under that contract were terminated and gone until the settlement between them and the defendant in 1876. For aught that appears here, at any time up to April, 1876, Gillen and Monroe could have tendered the money due upon this contract and called for a deed. It seems to me that in order to make the alleged representation material to this contract, and one which could produce the damage and injury to the defendant which is claimed, it must appear that the defendant bought something more than merely the plaintiff's contract rights against Gillen and Monroe, or, to express it in another way, the obligation of Gillen and Monroe to the plaintiff. I have given this question careful reflection during the progress of this trial, and I am unable to work out any other solution of it.

168 I think, therefore, that upon the proofs the case is within the rule laid down by the Supreme Court of the United States, namely, the court can now see, upon the evidence that bears upon the question of materiality of the representations, and alleged injury to the defendant, that if the jury were to render a verdict against the plaintiff it would have to set that verdict aside. If that be so, the court ought not to hesitate in directing a verdict. This being the view which I take of the case, I must hold that the defense which is interposed here is not, under the proofs, maintainable, and hence that the plaintiff is entitled to a verdict for the amount of his claim, namely, the principal of the notes and the interest on the same.

169 UNITED STATES OF AMERICA, } *ss:*
Eastern District of Wisconsin, }

I, Edward Kurtz, clerk of the circuit court of the United States for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with the originals now on file and remaining of record in my office, and that they are true copies of such originals, and correct transcripts therefrom, being a full and complete transcript of record in the case of Stephen Hubbard *vs.* L. M. Marshall.

In testimony whereof, I have hereunto set my hand, and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this seventh day of October, in the year of our Lord, one thousand eight hundred and eighty-two, and of the Independence of the United States the 107th.

[SEAL.] EDWARD KURTZ, *Clerk.*

170 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea, which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you,

between Stephen Hubbard, plaintiff, and L. M. Marshall, defendant, a manifest error hath happened, to the great damage of the said L. M. Marshall, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, that of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this first day of July, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the 106th.

[SEAL.] EDWARD KURTZ,
Clerk U. S. Circuit Court, Eastern Dist. of Wisconsin.

[Endorsed:] Filed July 1, 1882. Edw. Kurtz, clerk.

171 THE UNITED STATES OF AMERICA, *ss.*:

[SEAL.] To Stephen Hubbard, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein L. M. Marshall is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles E. Dyer, district judge of the United States for the eastern district of Wisconsin, at the city of Milwaukee, this first day of July, A. D. 1882, and of the Independence of the United States the 106th.

CHAS. E. DYER, *Judge.*

I accept service of the above citation, this 6th day of Oct., A. D. 1882.

J. D. MARKHAM,
Att'y for Def't in Error.

Endorsed on cover: E. Wisconsin C. C. U. S. No. 382. L. M. Marshall, plaintiff in error, *vs.* Stephen Hubbard. Filed 13th October, 1882.

117-415

SUPREME COURT U. S.
FILED
JAN 26 1884
JAMES H. McKENNEY, Clerk.

SUPREME COURT of the UNITED STATES.

L. M. MARSHALL, PLAINTIFF IN ERROR

vs.

STEPHEN HUBBARD, DEFENDANT IN ERROR.

BRIEF AND POINTS FOR PLAINTIFF IN ERROR

ON THE MOTION OF THE DEFENDANT IN ERROR TO DISMISS THE WRIT OF ERROR FOR WANT OF JURISDICTION.

SUPREME COURT of the UNITED STATES.

L. M. MARSHALL,

Plaintiff in Error,

VS.

STEPHEN HUBBARD,

Defendant in Error.

BRIEF AND POINTS FOR PLAINTIFF IN ERROR

ON THE MOTION OF THE DEFENDANT IN ERROR TO DISMISS THE WRIT OF ERROR FOR WANT OF JURISDICTION.

I.

The recovery for the def't in error in this case was the sum of six thousand six hundred and ten dollars and thirty six cents on verdict and judgment in court below. This recovery is *prima facie* the measure of the jurisdiction of this court on writ of error.

Merrill vs Perry 16 *Wal.* 338.

If, as here it is claimed, there is something in the re-

cord that shows to the contrary, then that record must be examined.

Gray vs Blanchard 97 *U. S.* 564.

It becomes of importance then to examine the record. The record is not printed. The motion under consideration recites, that it is based on the record. In a case like this, it was held that where the record had not been printed, a motion to dismiss would not be considered, as long as there was any question about the facts on which the motion rests or that required an examination of the record to decide, but consideration of such motion would be deferred until argument on the merits.

National Bank vs Insurance Co. 100 *U. S.* 43.

II.

Still it may be required that Plaintiff in error now present and argue all that is deemed needful as if the printed record were before the court. In resisting this motion to dismiss for want of jurisdiction, Plaintiff in error insists on the jurisdiction of this court.

A short history of this case before it reached this court will be helpful to a full and fair understanding of the merits of the motion under consideration. The action was commenced in State Court; Brown County Circuit Court, Wisconsin, by Stephen Hubbard against L. M. Marshall in the year 1877, tried before a jury on the same complaint as in the record appears now in this court, complaint in usual form upon two promissory notes, signed by the plaintiff in error, payable to defendant in error, for $2517.58 each, 10 per cent per annum interest and dated and made May 23d 1874; one was payable in one year and the other eighteen months from said date. On the first note was indorsed as paid Nov. 8, 1875, $365.11 and on the second indorsed as paid Nov. 25, 1875, $377.62 and Jan. 1st 1876, $945.71.

The answer on which the action was tried in the State Court was the same as the answer here, as will be seen by the record excepting that the fraud and concealment of the defendant in error in procuring said notes and others, and some cash, and also the allegation that ones Gillen and Monroe had surrendered all their rights growing out of the transaction to Plaintiff in error and that he, Plaintiff in error, had no security from from any source etc., was by due amendment allowed in U. S. Court as in the amended answer in the record and in this brief will more fully appear. The defendant in error recovered in the State Court November 1879, $867.22, the jnry having allowed the recoupment set up in the answer. Defendant in error then took the case to the Supreme Court of the State of Wisconsin, by appeal claiming the insufficiency of the damage awarded. The Wisconsin Supreme Court reversed the action of the State Court and remanded the case for a trial *de novo.*

Hubbard vs Marshall, 50 *Wis.* 322.

The Supreme Court of Wisconsin puts its decision of reversal on the sole ground of the admission of parole evidence to vary a written contract in the absence of an allegation of fraud in obtaining the notes—hence the amendment afterwards obtained in the U. S. Circuit Court. In the State Court after the action had thus been sent back for a new trial and in due course the defendant in error claimed a removal of the action to the United States Court on the ground of the prejudice of the inhabitants etc.—he defendant in error claiming to be a citizen of Texas and the plaintiff in error a citizen of Wisconsin, the cause was then removed to U. S. Circuit Court for East District of Wisconsin and in that Court in 1882 tried on the original complaint and on the answer as amended by leave of the court the answer as amended is now here set out in full.

ANSWER.

The defendant for a further and second amended answer to the complaint of the said plaintiff shows by leave of

this court thereto first had obtained on motion therefore viz:

1st. The defendant admits that he made and delivered the two notes in plaintiff's complaint, described and made the payment thereon as indorsed on, and so alleged in and by said complaint and that plaintiff is now the owner and holder thereof.

2nd. That said notes with one other of like amount, date and the last named interest now paid and taken up, and the sum of twenty five hundred and seventeen dollars and fifty cents in cash to equal and make the sum of ten thousand and fifty eight dollars and thirty cents were made, delivered and paid to said plaintiff by this defendant on the 23d day of May 1874 as the consideration for and purchase price of two notes, secured by mortgage on the north west quarter of the south west quarter of section 7, town 22, range 22, Brown Co. Wisconsin, made by Hugh Monroe for $800, each dated March 1st 1872, and on which notes five hundred dollars had been paid and endorsed before the purchase by this defendant; also a note of one Nicholas Gillen for one thousand and twelve dollars and eighty cents dated June 21 1873, interest 10 per cent per annum, also for the assignment and sale to the defendant by the plaintiff of a land and the pine timber on land contract then existing by and between the said plaintiff the owner of the land and the timber on the land mentioned, and Hugh Monroe and Nicholas Gillen, that said land and timber was all situate in Brown Co. state of Wisconsin and had long before that date been owned and possessed by and known to the said plaintiff. That to induce this defendant to make said notes and pay said cash the said plaintiff there and then represented, agreed and covenanted that there was then viz: May 23 1874, standing, being or growing on the land so contracted with Monroe & Gillen, and then sought to be sold to this defendant, three million feet of good sound merchantable pine timber, fit to be manufactured into lumber and shingles and worth the sum of two dol-

lars and fifty cents per M. stumpage and at that rate for said supposed and agreed three million feet of pine on such land the plaintiff and defendant figured to and arrived at the sum of ten thousand fifty eight dollars and thirty cents placing the said land and timber thereon at seven thousand five hundred dollars and the other notes and mortgages above mentioned at the sum of twenty-five hundred fifty eight dollars and thirty cents and which was all they were worth. That it was well known to said plaintiff that this defendant wanted said contract land only for the said pine timber, that the description of the land so alleged to contain the said three million feet of pine timber was the west ½ of N. E. of section 11 and north west ¼ of section 12 town 22 range 21, the west ½ of south east ¼, east ½ of south ¼ section 11, east ½ of north west ¼ of section 18, and south ½ of section 12 town 22 range 21, said county of Brown, that at said time and before the making and delivery of said notes and the payment of said sum in cash the plaintiff falsely and fraudulently guaranteed and represented that the said land contained and would yield the amount of three million feet of good merchantable pine timber; that said representation was fraudulently made and untrue as was well known to said plaintiff at the time he made the same and was so falsely and fraudulently made by him to induce the defendant to purchase the same and pay the cash and make the said notes; that believing and trusting in the statement and representation as to the said amount of pine timber on said land and solely induced thereby, did this defendant make and deliver said notes and pay said cash, viz:

That upon the execution and delivery of said notes, and the payment of said cash, and the assignment of said contract, for the pine land and pine upon land named in such assigned contract, the said Gillen and Monroe with the knowledge and assent of said plaintiff, surrendered and abandoned all claim to said pine land under said contract to this defendant, and thereupon as it was understood by the plaintiff at the time the assignment was made, and the said cash paid and notes made, this defendant at his own cost, risk and expense, proceeded to cut, haul and take

from said land all the merchantable and good pine therefrom; that upon such cutting, hauling, taking away, the ascertained shortage hereafter named was found, and this def't suffered a loss thereby, and in consequence of the failure of the said lands to yield the said three million feet of pine timber, in the sum of three thousand seventy four dollars and forty cents for which sum the defendant has no security of any name or nature and has not received from any source any compensation therefor, and will be at the loss thereof unless the same is allowed him by way of recoupment herein; that this def't has paid to said plaintiff on said contract price and on said notes aforesaid the sum of six thousand seven hundred and twenty-three dollars and fifty-three cents prior to the commencement of this action. That this def't, before the commencement of this action, caused to be cut, hauled and taken from said lands, said to contain the said three million feet of pine timber, all of the pine timber thereon of every kind fit for use; that all the pine timber on said land when so sold to this def't amounted to one million seven hundred and sixty two thousand eight hundred and thirty-six feet and no more, (1,762,836) that there is and was an ascertained shortage from the said three million feet sold and contracted to this defendant, of 1,237,164 feet of the value then and there of two dollars fifty cents, per M. and amounting to the sum of three thousand and seventy four dollars and forty cents, which sum the def't claims to recoup or set off as a part failure of the consideration of said notes and that the same may be allowed him as against so much of the said plaintiff's claim herein.

III.

The learned Judge of the U. S. Court directed a verdict for the defendant in error at the close of all the testimony in the case for the said sum of $6,610.36. It is regarding and to reverse such judgment, the writ of error is sued out of this court.

It is now claimed that the answer admits the demand of the defendant in error, and it is said the sum of $3,074.40 is set up as a defence, or set-off, or counter claim, and no more; thus it is claimed, admitting the matter in dispute to be less than $5,000. Counsel for defendant in error invoke the aid of

Tintsman vs Nat. Bank, 100 *U. S. page* 6,

to sustain this motion. This *supra* case was upon an agreed state of facts in the nature of a special verdict. There the claim made was for $8,233.79 and interest. Defendant there admitted that he owed of the amount $5,099.59, leaving the litigation only as to $3,134.20 and this was what the dispute was about. Here the amount is not admitted that will leave the dispute for a less sum than $5,000, not that we owed $6,610.36 or any sum in excess of of one thousand dollars. We do not even set up a counter claim in its known and proper sense, or ask to, be allowed as against the notes and interest thereon, the fixed sum of $3,074.40, so leaving the dispute only as to the difference between $6,611.36 and $3,074.40 which would leave $3,539.96 which this motion assumes we admit due the defendant in error.

True, we admit the making of the notes in suit as also another of like amount alleged payment of a large sum in cash, all to equal and make the sum of ten thousand fifty eight dollars and thirty cents—as the whole consideration, the bargain, the purchase money, for which the two notes in suit are only a part.

IV.

The answer, as will be perceived, is by way of a recoupment, setting up the damages, or part failure of consideration to defeat the claim of the def't in error. This is allowable under the well settled decisions of this and other courts, and conformable to the practice allowed by the laws of Wisconsin.

Revised Statutes of Wis. 1858, *Chap.* 126, *Sections* 1 *and* 2.

Railroad Co., vs. Smith, et al 21 *Wal.* 255

Van Buren, vs. Digges, 11 *How.* 461.

Dermott vs. Jones, 2 *Wal.* 1.

Dermott vs. Jones, 23, *How.* 220.

Chew vs. Brumagen, 13 *Wal.* 497.

The law of recoupment is clearly settled in the case, *Supra.* In *Batterman vs. Pierce* 3 *Hill,* 171, is found a full review of the question of recoupment, as it may apply to the case now before this Court.

Plaintiff in Error has set up the whole transaction, the purchase of choses in action, pine timber, land contract, all for his promises to pay and cash paid May 23, 1874, of $10,058.30. Marshall then gave these notes of $2,517.58 each and another of like sum and the cash to make all; equal the $10,058.30 agreed to be paid for articles purchased. That payment made before the commencement of the action on the transaction amounted to six thousand seven hundred and twenty-three dollars and fifty cents. Then if shortage of pine amounted to $3,074.40 would make a total of payments and short pine of $9,798.10, leaving only a balance of $260.20, admitted to be due defendant in Error; and thus leaving over six thousand dollars in controversy as fixed by the recovery.

Let us state the case in another light, but not the one, perhaps, the law may recognize as correct: The action of defendant in error is on two notes of $2,517.58, each dated May 23d, 1874, and together amount to principal sum of $5,035.16. Sundry payments are indorsed on the notes amounting to $1,686.45 and still casting interest on the notes at 10 per cent per annum, the notes are found to be equal to $6,610.36 at date of judgment March 2nd, 1882. Interest at 10 per cent per annum for seven years nine months and seven days—call it seven months and leave off the days, at same rate of interest on $3,074.40, for defen-

dant in error must be entitled, (in this way of viewing the matter), to a rebate from the very day of the transaction, this would be not far from $2,381.58 interest, which added to $3074.40 make $5,445.98 for a recoupment, and that from the recovery, leaves a balance of $1,154.32 only and more than five thousand dollars still in controversy, as shown by the recovery.

A third view, and the one plaintiff in error has always urged in all the courts where this case has so far gone, and the view that led to the recovery of $867.22 in the state court at the first trial in 1877 is as follows:

Amount of two notes in suit May 23d, 1874, $5.035.16; deficiency found and sought to be recouped of shortage of pine to the amount of $3,074.40—deducted as of the date of the transaction, for then the consideration fails as the pine sold was not there at that date—leaves the principal sum due on the notes of $1964.76 to draw interest from May 23d 1874 at 10 per cent per annum to date of the first payment indorsed on the notes, 1 year and 5 months, is $288.32, making debt November 5th 1875, $2,253.08. There is then paid $365.11, making new principal of $1887.97. Interest on that sum 20 days is $11.73 making amount due Nov. 25 1875, $1,899.70. There was then paid $377.62, leaving the principal $1,522.08. Interest on the same one month and 6 days $15.33, making amount due January 1st 1876 $1,537.41. There was then paid $945.71 leaving the principal $592.70. Interest on this sum to March 2d 1882 would be for six years two months and two days $364.21, making total due at date of judgment of $956.91 instead of $6,610.36. So by very force of the recoupment pleaded more than five thousand dollars in controversy and less than one thousand admitted due.

T. R. HUDD,
ATTORNEY FOR PLAINTIFF IN ERROR.

117-415.

FILED
OCT 21 1885
JAMES H. MCKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

(NO. 110.)

OCTOBER TERM, A. D. 1885.

L. M. MARSHALL,
Plaintiff in Error,

vs.

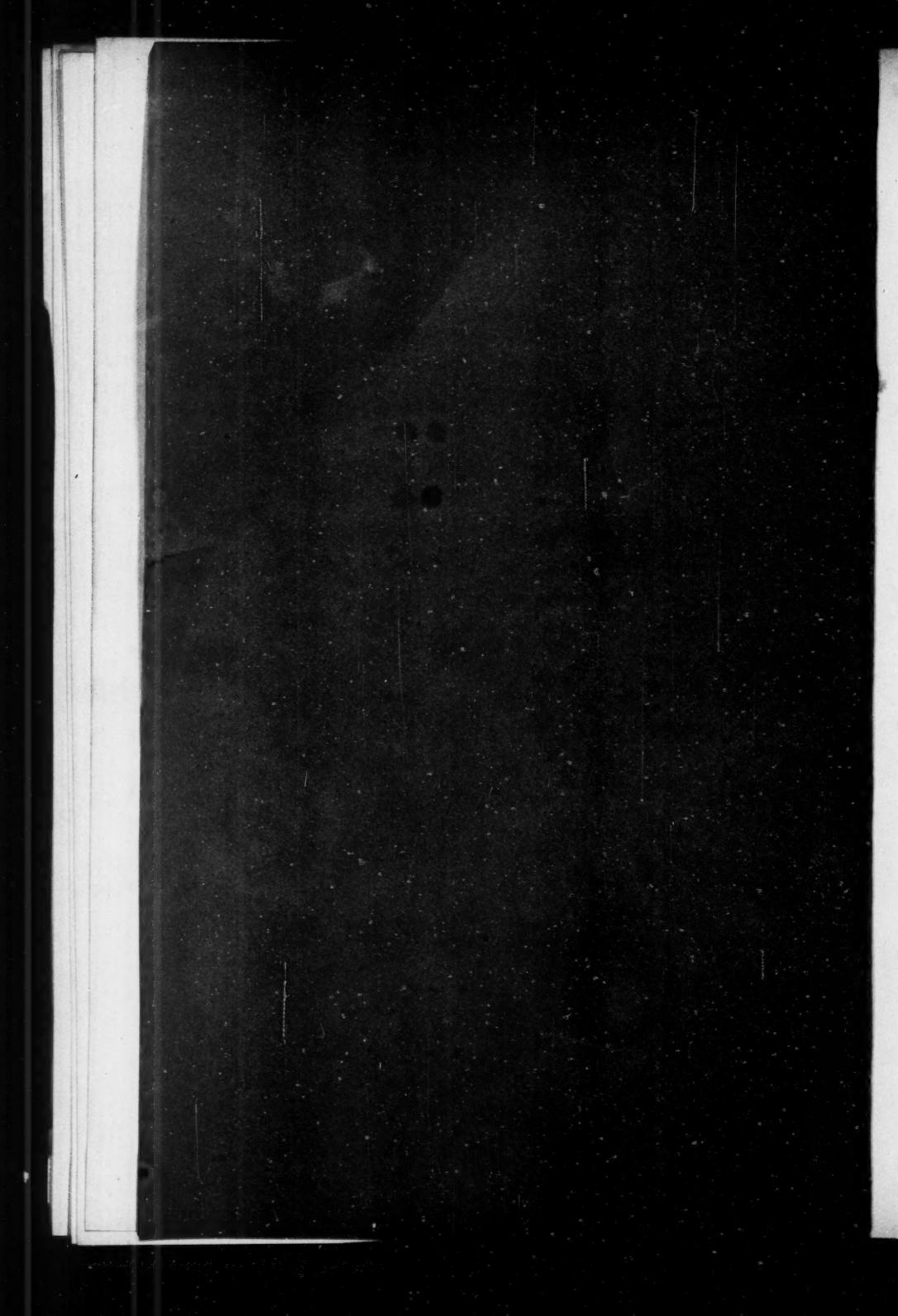
STEPHEN HUBBARD,
Defendant in Error.

Error from Eastern District of Wisconsin.

BRIEF FOR PLAINTIFF IN ERROR.

T. R. HUDD,
Attorney for Plaintiff in Error.

E. ROOT, PRINTER, GREEN BAY.



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L. M. MARSHALL,
Plaintiff in Error,

vs.

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Defendant in Error.

Error from Eastern District of Wisconsin.

BRIEF FOR PLAINTIFF IN ERROR.

I.
STATEMENT OF CASE.

This action was commenced in State Court; Brown County Circuit Court, Wisconsin, by Stephen Hubbard against L. M. Marshall, in the year 1877; tried before a jury on the same complaint as in the record appears now in this Court; complaint in usual form, upon two promissory

notes, signed by the plaintiff in error, payable to defendant in error, for $2,517.58 each, 10 per cent. per annum interest, and dated and made May 23d, 1874. One was payable in one year and the other eighteen months from said date. On the first note was indorsed as paid Nov. 8, 1875, $365.11, and on the second indorsed as paid Nov. 25, 1875, $377.62 and Jan. 1st, 1876, $945.71.

The Answer on which the action was tried in the State Court was the same as the Answer here, as will be seen by the record, excepting that the fraud and concealment of the defendant in error in procuring said notes and others, and some cash, and also the allegation that ones Gillen and Monroe had surrendered all their rights growing out of the transaction to plaintiff in error and that he, plaintiff in error, had no security from any source, etc., was by due amendment allowed in U. S. Court as in the amended answer in the record and in this brief will more fully appear. The defendant in error recovered in the State Court November, 1879, $867.22, the jury having allowed the recoupment set up in the answer.—Defendant in error then took the case to the Supreme Court of the State of Wisconsin, by appeal, claiming the insufficiency of the damage awarded. The Wisconsin Supreme Court reversed the action of the State Court and remanded the case for a trial *de novo*.

Hubbard vs. Marshall, 50 *Wis.*, 322.

The Supreme Court of Wisconsin puts its decision of reversal on the sole ground of the admission of parole evidence to vary a written contract in the absence of an allegation of fraud in obtaining the notes—hence the amendment afterwards obtained in the U. S. Circuit Court. In the State Court, after the action had thus been

sent back for a new trial, and in due course the defendant in error claimed a removal of the action to the United States Court on the ground of the prejudice of the inhabitants, etc.—he, defendant in error, claiming to be a citizen of Texas and the plaintiff in error a citizen of Wisconsin. The cause was then removed to U. S. Circuit Court for East District of Wisconsin, and in that Court, in 1882, tried on the original complaint and on the answer as amended, by leave of the court. The answer as amended is now here set out in full.

ANSWER.

"The defendant, for a further and second amended answer to the complaint of the said plaintiff, shows by leave of this Court thereto first had obtained on motion therefore, viz:

1st. The defendant admits that he made and delivered the two notes in plaintiff's complaint described, and made the payment thereon as indorsed on, and so alleged in and by said complaint, and that plaintiff is now the owner and holder thereof.

2nd. That said notes, with one other of like amount, date, and the last named interest now paid and taken up, and the sum of twenty-five hundred and seventeen dollars and fifty cents in cash, to equal and make the sum of ten thousand and fifty-eight dollars and thirty cents, were made, delivered and paid to said plaintiff by this defendant on the 23d day of May, 1874, as the consideration for and purchase price of two notes, secured by mortgage on the north-west quarter of the south-west quarter of section 7, town 22, range 22, Brown Co., Wisconsin, made by Hugh Monroe for $800, each dated March 1st, 1872, and on which notes five hundred dollars had been

paid and endorsed before the purchase by this defendant; also a note of one Nicholas Gillen for one thousand and twelve dollars and eighty cents, dated June 21, 1873, interest 10 per cent per annum; also for the assignment and sale to the defendant by the plaintiff of a land and the pine timber on land contract then existing by and between the said plaintiff, the owner of the land and the timber on the land mentioned, and Hugh Monroe and Nicholas Gillen; that said land and timber was all situate in Brown Co., State of Wisconsin, and had long before that date been owned and possessed by and known to the said plaintiff. That to induce this defendant to make said notes and pay said cash the said plaintiff there and then represented, agreed and covenanted that there was then, viz: May 23, 1874, standing, being or growing on the land so contracted with Monroe & Gillen, and then sought to be sold to this defendant, three million feet of good, sound, merchantable pine timber, fit to be manufactured into lumber and shingles and worth the sum of two dollars and fifty cents per M. stumpage, and at that rate for said supposed and agreed three million feet of pine on such land the plaintiff and defendant figured to and arrived at the sum of ten thousand fifty-eight dollars and thirty cents, placing the said land and timber thereon at seven thousand five hundred dollars, and the other notes and mortgages above mentioned at the sum of twenty-five hundred fifty-eight dollars and thirty cents, and which was all they were worth. That it was well known to said plaintiff that this defendant wanted said contract land only for the said pine timber; that the description of the land so alleged to contain the said three million feet of pine timber was the

west ½ of N. E. of section 11 and north-west ¼ of section 12, town 22, range 21, the west ½ of south-east ¼, east ½ of south ¼, section 11, east ½ of north-west ¼ of section 18, and south ½ of section 12, town 22, range 21, said county of Brown; that at said time and before the making and delivery of said notes and the payment of said sum in cash the plaintiff falsely and fraudulently guaranteed and represented that the said land contained and would yield the amount of three million feet of good, merchantable pine timber; that said representation was fraudulently made and untrue, as was well known to said plaintiff at the time he made the same, and was so falsely and fraudulently made by him to induce the defendant to purchase the same and pay the cash and make the said notes; that, believing and trusting in the statement and representation as to the said amount of pine timber on said land, and solely induced thereby, did this defendant make and deliver said notes and pay said cash, viz:

That upon the execution and delivery of said notes, and the payment of said cash, and the assignment of said contract, for the pine land and pine upon land named in such assigned contract, the said Gillen and Monroe, with the knowledge and assent of said plaintiff, surrendered and abandoned all claim to said pine land under said contract to this defendant; and thereupon, as it was understood by the plaintiff at the time the assignment was made, and the said cash paid and notes made, this defendant, at his own cost, risk and expense, proceeded to cut, haul and take from said land all the merchantable and good pine therefrom; that upon such cutting, hauling, taking away, the ascertained shortage hereafter named was found, and this defendant suffered a

loss thereby, and in consequence of the failure of the said lands to yield the said three million feet of pine timber, in the sum of three thousand seventy-four dollars and forty cents, for which sum the defendant has no security of any name or nature, and has not received from any source any compensation therefor, and will be at the loss thereof unless the same is allowed him by way of recoupment herein; that this defendant has paid to said plaintiff on said contract price and on said notes aforesaid the sum of six thousand seven hundred and twenty-three dollars and fifty-three cents prior to the commencement of this action. That this defendant, before the commencement of this action, caused to be cut, hauled and taken from said lands, said to contain the said three million feet of pine timber, all of the pine timber thereon of every kind fit for use; that all the pine timber on said land when so sold to this defendant amounted to one million seven hundred and sixty-two thousand eight hundred and thirty-six feet, and no more, (1,762,-836;) that there is and was an ascertained shortage from the said three million feet sold and contracted to this defendant, of 1,237,164 feet of the value then and there of two dollars fifty cents per M., and amounting to the sum of three thousand and seventy-four dollars and forty cents, which sum the defendant claims to recoup or set off as a part failure of the consideration of said notes, and that the same may be allowed him as against so much of the said plaintiff's claim herein."

The learned District Judge of the U. S. Court directed a verdict for the defendant in error at the close of all the testimony in the case for the

sum of $6,610.36. It is regarding and to reverse such judgment the writ of error is sued out of this court.

II.

Assignment of Errors.

1st.—The Circuit Court erred in refusing to allow the case, as made at the close of all the evidence, to go to the jury.

2d.—The Circuit Court erred in directing a verdict for the plaintiff in the sum of $6,610.36, or any sum.

3d.—The Circuit Court erred in the rejection as well as in the admission of the evidence offered, refused or admitted.

4th.—The Circuit Court erred in refusing to allow and grant a new trial to the plaintiff in error on motion duly made, for that the verdict was contrary to the evidence and the Law.

III.

The Evidence

Shows that in April, 1873, defendant in error Hubbard made and entered into a Land *and Timber* contract (see Exhibit No. 2,) with Nicholas Gillen and Hugh Monroe, parties of the second part, whereby said Gillen and Monroe were to pay to said defendant in error, or his assigns, the sum of nine thousand eight hundred and eight dollars in twelve equal payments of eight hun-

dred and seventeen dollars and eighty-eight cents; first payment August 1st, 1873, and every three months thereafter until fully paid—and the same being intended to apply, when fully completed, as the purchase money of—

First—Two hundred and forty acres of land designated; *reserving* to defendant in error all the White Oak timber on eighty acres of same;

Second—For what lumbermen call *stumpage*—or the Pine timber only on Five Hundred and sixty acres of other land owned by the defendant in error; all in Brown Co., State of Wisconsin.—The title to all of the property named in the contract to remain in defendant in error Hubbard until all of the payments were made, and only in case of full payment the land named as sold to be conveyed and *timber* relinquished.

Contract contains the further provision: "And it is distinctly agreed and understood by and between the parties hereto, that if the said parties of the second part shall fail to make any of the payments of purchase money above specified at the time and in the manner above specified, in such case this arrangement shall be utterly void, and all the payments thereon forfeited; subject only to be renewed by the act of the party of the first part, or the mutual agreement of both parties."

In May, 1874, defendant in error Hubbard not receiving the payments stipulated for in the contract, went to the office of plaintiff in error Marshall, in the city of Green Bay, Wis.—a lumber and shingle merchant—who had been advancing Gillen and Monroe—and, as plaintiff in error claims, (see page 29, Case,) wanted to sell the contract he (Hubbard) had with said Gillen and Monroe. That then and there it was finally

agreed that defendant in error would and did sell to plaintiff in error the said land contract—except one eighty acres of land—the Pine timber on the 560 acres and two mortgages on other and separate lands and premises theretofore made by Gillen and Monroe, on which it was claimed there was thirteen hundred 12-100 dollars and interest due and unpaid—and for which the plaintiff in error was to pay the gross sum of ten thousand fifty-eight dollars and thirty cents, and made three notes of two thousand five hundred and seventeen dollars and fifty-eight cents each; paid cash at same time to equal the sum of $10,058.30. That prior to the commencement of this action plaintiff in error had paid one of the said three notes in full and sixteen hundred eighty-eight dollars and forty-five cents on the two notes in suit, making a total payment on the purchase of six thousand seven hundred and twenty-three dollars and fifty cents. All of the contract made at the date of the execution of the assignment (Exhibit No. 1) was not reduced to writing. This Exhibit No. 1, merely the formal execution or the transfer of the paper evidences of the things sold or to be conveyed to plaintiff in error, with this more than significant covenant or declaration in the assignment. (see page 67, Case:)

"This assignment of the mortgage and contract herein described being upon this express condition, that the said three promissory notes, executed by said L. M. Marshall to the said Stephen Hubbard, in the sum of $2,517.58-100, each due respectively in six, twelve and eighteen months from date, be paid when matured, then this assignment to be valid; but in case of default in the payment of said notes, or either of them, then this assignment to be void and of no effect.

Said mortgages and contract, in the meantime, to be left in the custody of Billings and Huntington, Attorneys, in Green Bay, Wisconsin."

And this further declaration of the assignor (see page 67, Case,) as it relates to the contract sold: "The said Stephen Hubbard hereby reserving the right to foreclose and enforce the covenants contained in said last named contract in his own interest and behalf, in case of default in the payment of either of these promissory notes executed this day by L. M. Marshall."

There is then evidence tending to show that Hubbard offered to throw off Fifteen Hundred dollars from his contract price with Gillen and Monroe to induce the defendant in error Marshall to make the purchase. Marshall says (page 30, Case)—"Hubbard offered to throw off fifteen hundred from the contract if I would buy it, and then we went on to find out what I was buying; I asked Mr. Hubbard how much pine there was left standing on that contract he was selling me, and his reply was there was three million good merchantable pine left to cut yet, and then we talked about the value of that pine—how much the stumpage would be—and it was agreed between us two dollars and a half a thousand stumpage. That is the way I figured it up. I think at that time he offered to take ten thousand dollars for the contract. He said he would lump it right out at ten thousand dollars; or would figure it up and take off fifteen hundred dollars from what there was coming on the contract.—My not knowing how much there was coming on the contract, I told him I would prefer to have it figured up. By his guaranteeing there was three million of pine on it, I would take it. He said

he would guarantee there was three million pine left on the land, that was to be cut. I told him I would take it at the fifteen hundred dollars discount from the contract with Gillen and Monroe. After we got through talking we adjourned there and went to Billing's office, and they made out the papers and I made out the notes, and they were consummated there.

Q. Was there any further agreement or understanding after you got to the lawyer's office, or was that all had at the store?

A. All had at the store. There was nothing said about the contract in the office. *Only just it was transferred to me.*

Q. What was said, if anything, in relation to what you were to purchase from him? How much were you to pay him? How much were you to pay him, in the first place?

A. We did not know how much the purchase would amount to. At that time it was not figured up. They figured it up, over to Billing's office. There was some thing said about a tract of land that was to be reserved—that was not to be put into the contract. That was in the contract, but was not to be put into the contract transferred to me.

Q. Who talked about reserving that?

A. Mr. Hubbard. He said he wanted to reserve that part of the land and transfer the balance to me. I gave three notes and made a cash payment, which was twenty-five hundred and something. Three notes were given, payable in six, twelve and eighteen months. The entire sum agreed upon to be paid was ten thousand and some odd dollars. It figured up the same on the contract deducting fifteen hundred dollars. I don't recollect the exact amount—ten thousand

and fifty odd dollars. The fifteen hundred dollars was subtracted, leaving ten thousand and fifty. I figured the three million of pine, $2.50 a thousand—$7,500. Then there was the mortgage on the mill of one thousand dollars, and another mortgage of Monroe or a note; there had been some paid on it. I don't recollect the exact amount; I didn't consider it a note good for anything; Monroe was not able to pay it.

Q. How did you come to pay the $2.50?

A. I considered the stumpage of that value, and I think Hubbard assented to it. He knew we were figuring at $2.50 a thousand.

Q. Was there anything said by Mr. Hubbard—anything about if it should fall short of three million?

A. He said he would make it good. I asked him if he would give me time to find somebody to go and look over the land and examine the timber. He said he would not. It must be closed right up that day, or he should proceed to take possession of it, or something of that kind. I had not been on the land before.

Q. Had you any way of ascertaining, except from Mr. Hubbard, the true state of the quantity of timber upon that land?

A. I had not. I knew nothing about it; only what I got from Mr. Hubbard. I was then dealing in pine timber, shingles and lumber, and knew the general market. That quality of pine, located where that was, was worth $2.50. I would have paid that for any amount I could have got."

JAMES MARSHALL, (see page 32, Case,) present at the time of the making of the agreement for the purchase of the pine, &c., says:

"Heard the bargain made between the parties

in relation to the pine lands in controversy—heard it in the store. * * * * This was in the forenoon. When he first came in, in the first place, Hubbard came and wanted my brother to buy some order that was drawn between him and Monroe. He refused to do it. Then Hubbard started for the door, and the last word I heard him say, he "would be damned if he would not close the thing up to-day," and went off. Then Gillen started out of the store, and after a while Hubbard came back. Then they talked about the sale of the property. Hubbard offered the contract he had with Gillen and Monroe to my brother, and on that contract offered to throw off fifteen hundred dollars with the representation of a certain amount of pine; as I understood it then; as they had talked before. And my brother said to him, 'as he had never seen the property, and did not know anything about it, he was not ready to make a bargain on any such ground,' and then Hubbard turned around to him and says—'I am good for three million feet of pine, and, by God, I will warrant three million feet of pine on that land.' And my brother then says, 'there being three million feet of pine that he would warrant as good, he would close the trade;' and then Hubbard says, 'we will go over to the office and make the notes.' * * * * * What I heard said was this—they reckoned the pine—the stumpage—at $2.50, and they were figuring what it would come to."

Returning to Mr. Marshall, the plaintiff in error's testimony, on page 35, Case—The only thing that induced me to buy this contract was Mr. Hubbard's guaranteeing there was three million of pine on it. If he had not guaranteed

that I would not have bought it at all. I believed his statement. I relied on Hubbard's guarantee that there was three million feet of pine upon the land. I bought relying on his statement.—By actual scale there was one million, seven hundred and sixty-two thousand and sixty-six feet on the land. (1,762,836.) There is no conflict in the evidence that this amount is all there was of pine found on the lands—also that the market value of stumpage was $2.50 per M.

It is in evidence from the statement of plaintiff in error Marshall (page 35, Case,) and the witness Gillen, (page 45, Case,) that part of the conversation at the store, in relation to the purchase of pine, as related by Gillen:

"I was present in the store when Marshall and Hubbard were together. This was in the afternoon. Marshall asked me, in the presence of Hubbard, how much pine was on that land, and I told him I did not know. Says he, 'Hubbard says there is three million on there.' I said 'May be there is; may be there ain't. I can't tell.' Hubbard did not say anything when Marshall said he had said there was three million feet. He kept silent; I knew they were negotiating in relation to the purchase of that land. They had been talking before that."

In the evidence of Hugh Monroe (see pages 46 and 47, Case,) speaking of the land and pine in question—there is strong testimony enough to go to a jury at least to show the knowledge of Hubbard and his intent to defraud as to amount of pine on the land.

"I think I have known Hubbard since 1868 or 1869—as long as that. I bought the land first myself alone, before Gillen came in with me.—

When I bought it first, I can't recollect just how I came to suppose he had it for sale. Probably I wanted to purchase it. The next thing was to agree upon a price. I think that must have been in 1872. I think Hubbard wanted ten thousand dollars for it, and he told me there was about four million, or four and a half million; and I wanted to look the land over; and the next time I seen him I told him I would not like to buy it for four and one half million. I think I made the contract that there was about four million on it. I think that was the understanding, as near as I can remember. He said he thought there was upon the land about four and a half million pine. He was willing to sell it to me for four. I think he did contract it for four million. I cannot tell positively now how much pine I took off the land after Hubbard had said there was four million up to the time Marshall came into the transaction. I think Andrew Mattison was logging for me one winter. I think he put in five hundred thousand. I think the aggregate must be somewhere about twenty-five hundred thousand. It was fully as much as that. It may be twenty-seven hundred thousand; I can't tell exactly. I am only guessing at that now. It is only a rough estimate.

When I bought the mill first I got logs off of that land and was cutting them in that mill.—Hubbard came and I think I paid him some money there once, or more times may be. Of course he had seen me cut the logs, and I supposed he knew they were coming off the lands purchased of him. I had no other land except that.

Q. Did not Mr. Hubbard know you were buying that land for the purpose of using that mill

to cut up the lumber there was there?

A. I think that is stated in the contract.

Q. How often was he there during that time?

A. I could not tell; he had been there several times.

Q. Was not Hubbard a man that looked after his money pretty close?

(Objected to by plaintiff. Sustained. Exception by defendant.)

Witness—I could not tell how many times Hubbard was there. He came several times. Sometimes he would stop at my house—once or twice. He was not there very often. If he came in the winter time, of course we were logging; if in the summer time, when the mill was running, we were sawing them up.

Q. Did he ever ask you how you were getting along; how much lumber you were making, or anything of that kind?

(Objected to, as leading. Sustained. Exception.)

Q. Can you remember any conversation—anything in relation to the logs?

A. No Sir.

Q. How long did you continue to operate alone before Gillen came in?

A. I think the mill burned down in 1873. It was then rebuilt; Gillen and I rebuilt it. I think Hubbard loaned Gillen some money to rebuild that mill and operate these lands.

Q. How much money did he let you have?

(Objected to. Sustained, and defendant excepts.)

Witness—I went over the land before I bought it originally. Hubbard did not go over it with me at that time.

Q. Did he go over the land with you?

A. I proposed to look over the land. I think I rode across on the old road once. I think that is the only time that I and Hubbard had been on the land together. I don't recollect whether this was just after or before we made the bargain.—It was just about that time. Hubbard said then that he thought there was more pine than he thought there was. This little piece we were going over had been lumbered off. He thought it was taken off cleaner than it was. That is the impression I got that day. He thought there was not so much pine on the south half as there really was. He had underestimated it instead of over. That is the impression I got that day. He thought they could cut off four and one half million."

The remander of evidence is that furnished by and from the defendant in error only. In it and from it we insist that the case of the plaintiff in error is still more strengthened.

IV.

Points and Argument.

The Answer, as will be perceived, is by way of a recoupment, setting up the damages, or part failure of consideration to defeat the claim of the defendant in error. This is allowable under the well settled decisions of this and other courts, and conformable to the practice allowed by the laws of Wisconsin.

Revised Statutes of Wis. 1858, *Chap.* 126, *Section* 1 *and* 2.

Railroad Co. vs. Smith, et al, 21 *Wal.*, 255.

Van Buren vs. Digges, 11 *How.*, 461.
Dermott vs. Jones, 2 *Wal.*, 1.
Dermott vs. Jones, 23 *How.*, 220.
Chew vs. Brumagen, 13 *Wal.*, 497.

The law of recoupment is clearly settled in the cases, *Supra.* In *Batterman vs. Pierce*, 3 *Hill*, 171, is found a full review of the question of recoupment, as it may apply to the case now before this Court.

Plaintiff in error has set up the whole transaction—the purchase of choses in action, pine timber, land contract, all for his promises to pay and cash paid May 23, 1874, of $10,058.30. Marshall then gave these notes of $2,517.58 each, and another of like sum, and the cash to make all equal the $10,058.30, agreed to be paid for articles purchased. That payment made before the commencement of the action on the transaction amounted to six thousand seven hundred and twenty-three dollars and fifty cents. Then, if shortage of pine amounted to $3,074.40, would make a total of payments and short pine of $9,798.10, leaving only a balance of $260.20, admitted to be due defendant in error.

There are two views to be presented, and two distinct points to be made, on this argument—

First.—Was not the evidence as to the part failure of consideration admissable under the allegation as to a warranty of three million feet of pine on the lands in question, as a contract, made with plaintiff in error, not reduced to writing but resting in parole, or, in other words, taking

the contrary view on this point to that taken by the learned U. S. District Judge and the Supreme Court of Wisconsin?

Second.—Was not the evidence of the fraud and damage to the plaintiff in error sufficiently in evidence to allow and compel the jury to pass on the same?

It will not be claimed that the decision of the Supreme Court of Wisconsin, *Hubbard vs. Marshall*, 50 *Wis.*, 322, is binding on this Court, save as it may be good law or otherwise, as this Court shall decide for itself. The gist of the Wisconsin Supreme Court decision is that, as the parties reduced their *whole* contract to writing, no parole evidence is to be allowed to alter or vary same in the absence of an allegation of fraud, &c., which allegation would change the rule and allow the parole evidence, &c. All this is based on the two Exhibits—Nos. 1 and 2 in this record—as constituting a contract covering the whole subject and in writing. We insist that, so far as the plaintiff in error is concerned, there was with him no contract in writing in the sense given by the Supreme Court of Wisconsin and the learned U. S. District Judge. How could the Court say that it was all reduced to writing, when the Marshalls testify that it was not; and what is it, that this Court is asked to follow in the wake of the Wisconsin Supreme Court and declare to be an entire and perfect contract, embracing the whole subject?

We are told by the opinion (Marshall vs. Hubbard, *supra*) that—"The rule which allows the

maker of a promissory note to show in an action upon it a failure or partial failure of consideration, is not sufficiently broad to cover this case. Here we have written instruments which set out *particularly* the consideration of the notes in suit, to wit: the assignment of notes and mortgages and of a contract to convey lands and to *sell timber upon other lands.* The right to prove a failure of consideration would admit evidence of the failure of any consideration expressed in the writings as that the title to any of the property thus sold or assigned had failed but does not go to the extent of allowing proof of an additional consideration not expressed in the writing and a failure thereof." Exactly; Hubbard sold land, and sold timber on land alone to be cut and taken off. How much timber was on the land so to be cut over was not anywhere specified in writing. That part of their contract was not reduced to writing, we say. We understand the Court to say, it must be considered as in the contract, in writing, that he was to pay so much, no matter what he received in return, if the land had not a stick of timber thereon. Say that trespassers, unknown to Hubbard, had stripped it of every foot of pine, and he, Marshall, had actually bought the right to nothing, still, it is said, there was no failure of consideration to be shown.—Marshall paid for three million feet of pine; got only a little more than half of that amount, and he cannot plead or show the failure of the consideration, because he had agreed to pay for land and pine timber on land? This written contract, it is said, Marshall was a party to, and so must not contradict—was what? 1st, his (Marshall's) note; but this standing alone could be defended against for the want of this pine on the same, and

such a representation or guaranty as alleged here, comes fully within the cases cited above. 2nd, it is said it was his assent to the contract of assignment of Hubbard's interest in certain choses in action. To state it in the language of the Court: "The instrument signed by the plaintiff, and accepted by the defendant, and the notes signed by the latter and delivered to the former, constitute an agreement in writing. The terms of the agreement are clearly expressed, and the writing contains no clause from which it may be inferred that the parties did not intend to incorporate in them the contract, just as it was made and the whole of it. There is no claim of mistake *or suggestion of fraud.* The writing purports to state the whole contract, and, in the absence of any claim of fraud or mistake, they must be held to contain the whole contract."

Plaintiff Hubbard made his case on the notes alone; no mention or claim on plaintiff's part that he had any other contract. He, Hubbard, had in fact no other contract at the time he commenced suit on the notes. The assignment provided for a contingency that rendered it "void and of no effect" to-wit: the default or failure to pay the said notes by Marshall, and, together with the fact that there was to be no delivery of the assignment until the notes were paid; (see exhibit No.1)and no delivery was ever shown of the same; or, if delivery was had, it was contrary to the letter of the contract, and could not be shown so as to change the written contract as to the way and manner of delivery, under the authorities relied upon to sustain the decision herein; also the assignment contained the reserved right on the part of Hubbard "to forclose and enforce the

covenants contained in the contract with Gillen and Monroe, in his own interest and behalf, in case of default in payment of either notes, &c." If, then, the assignment became void and of no effect, as by its terms provided, it did not figure in the case; or, if allowed in the case, ought not to control, and the question would still be as to the original transaction between Hubbard and Marshall—the making of the notes in suit and the question of the failure of consideration for the same.

Partial failure of consideration of a note given in part payment for land sold, arising out of misrepresentation respecting the quantity of standing timber, (trees thereon) may be given in evidence in defense to an action upon the note.

Drew vs. Towle, 27 *New Hampshire*, 412.
Hammatt vs. Emerson, 46 *Am. Dee*, 598 *and note.*
Brewer vs. Harris, 41 *Am. Dee* 587 *and note.*
Smith vs. Bush, 57 *Am. Dee.* 207.
Young vs. Hunt, 1 *Coxe* (*N. J.*) 235.
Morrell vs. Colden, 13 *Johnson*, 395.

It must have escaped the notice of the Supreme Court of Wisconsin that such instrument as we are told here make and contain the whole contract, that could *not* be varied by parole evidence, has already been decided by that Court to be no such an instrument! We think we had a right to claim the protection of the doctrine of STARE DECISIS there as to this one question, that must have controlled the decision against the ruling of the Circuit Court—viz:—

Hahn vs. Doolittle, 18 *Wis.* 196.

With this decision unreversed, (and such reversion, we think would be most unjust and unreasonable, and it has been the law of the land in

Wis. for 20 years last past)—the decision we complain of could not have been made. Here was the sale of choses in action, notes and mortgages, and the Court say, page 199 *of* 18 *Wis:* "It appears from the complaint that the transfer was effected by means of a written assignment, although its terms do not appear; yet the fair inference from the complaint is that there was no warranty in the assignment of the sufficiency of the security in the assignment." We allege an express warranty as to *quantity*. The authority, on page 197 of *Hahn vs. Doolittle*, *supra*, holds as to quantity; as also this court, that such representation does amount to a warranty. *Hahn vs. Doolittle* decides that, notwithstanding such written instrument, an assignment,—and the instrument here is no more, no less—the warranty may be shown to effect the liability of the vendee, or

The opinion of the Court we now quote, from *Hahn vs. Doolittle*, is so *apropos* that we quote almost the entire opinion, on the point, as applicable here.

"And the respondent's counsel suggests that if there was no warranty in the assignment none could be shown. He relies on the familiar rule that where the parties reduce their contract to writing, the writing is presumed to contain the whole contract, and cannot be shown, by parole, that other things were agreed on at the same time. No rule is better settled than this, but it is not applicable to instruments, which, from their very nature, do not attempt to state the entire agreement in respect to the subject matter but are adopted merely to transfer title in execution of an agreement they do not profess to show.—Deeds of land, assignments of choses in action, bills of sale, indorsements of notes, and other

similar instruments are of this character. They are very commonly used in execution of complicated and extensive agreements which they make no attempt to show. The presumption, therefore, that the writing contains the whole contract does not prevail. Thus, suppose A owns a note payable to his order, and B, by a verbal agreement, sells him a horse, warranting it to be sound, in consideration that A shall indorse to him the note. The indorsement would, in one sense, be a contract in writing. But would A be precluded from showing the verbal agreement of sale and warranty merely because, in execution of it, there was a written indorsement in which the warranty was not recited? Certainly not, and the same considerations are applicable to assignments, bills of sale, and other similar instruments, where they profess to do no more than merely to transfer title in the usual manner. The question was considered in

Frey vs. Vanderhoof, 15 *Wis.*, 397,

and the view above stated was sustained, and several authorities cited in support of it. In addition to those, the following may also be referred to:

Wentworth vs. Buhler, 3 *E. D. Smith* 305.
Filkins vs. Whyland 24 *Barb.* 379.
Knight vs. Knight, 28 *Georgia*, 165.
Creamer vs. Stephenson, 15 *Met.*, 211.
Taylor vs. Gall, 3 *Green* (*Iowa*) 23.

"This distinction has not always been observed, and there are cases against the rule which we now hold. But we think it founded in reason and sustained by the authorities referred to.—Perhaps the case cited from Maryland improperly applies it to a case within the general rule. But if applicable there it certainly would be to a bill

of sale or assignment. The plaintiff, therefore, would be at liberty to prove and rely upon these representations as a warranty, although not in the assignment."

Ballston Spar Bank vs. the Marine Bank, 16 *Wis.*, 120.
Jilson, executor, &c. vs. Gilbert et al., 26 *Wis.*, *p.* 648.

If *Hahn vs. Doolittle, supra*, is of any authority in Wis., that Court will retrace the path made by the decision now under discussion. The assignment does not do more than to profess to pass title, pursuant to agreement, of the several choses in action—with the bare exceptions that can not take it out of the rule in *Hahn vs. Doolittle, supra*, viz: Hubbard reserves a part of the land contracted to Gillen and Monroe and the right to foreclose the land contract in his own interest.—With these exceptions it is the naked and the usual assignment—such an one as is passed upon in *Hahn vs. Doolittle, supra.*

Instead of being, as it might, three separate assignments, stating the considerations separately or indorsed on the mortgage and contract or annexed to each, it, assignment, was on one piece of paper, referring to the three instruments so sold and the assignment so evidencing the passing of the title to each—nothing more.

Now, on the *Second* branch of the argument.

The learned District Judge directed a verdict for the plaintiff, on the ground that the evidence failed to show that the defendant had sustained damage from any false or other representations made by the plaintiff Hubbard; that defendant Marshall purchased only an obligation against Gillen and Monroe—not land, or pine on land—therefore no injury could result to defendant, whatever the representations were.

The evidence, under the Answer, that alleged fraud, tends to show a false representation, that on certain land were 3,000,000 feet of good, merchantable pine; that, to induce the defendant to purchase a land contract outstanding thereon, this fraudulent statement, believed, was the inducement to purchase, and that it was understood, as the fact was, that defendant Marshall made the purchase because of the pine only, and that he was to have the same, when taken from the land, to manufacture into shingles, lumber, etc.; that defendant did have all the pine; that the pine fell short over a million feet, and that, as against his notes given for the purchase price of the land and Pine timber contracted, from which he was to realize the consideration, therefore he claimed to set off the shortage as damage he, defendant, had sustained. The learned District Judge puts his decision (directing a verdict for plaintiff and declaring that the evidence does not show damage or injury to the defendant,

Marshall,) on the sole ground that defendant purchased only a claim or obligation against Gillen and Monroe; that he did not purchase land or pine on land; so that it makes no difference what fraud there is in the case, he, defendant, can have no recourse or recovery against Hubbard; and of course, if not against Hubbard, then against no person, as he has no contract, express or implied, with any others growing out of the transaction.

It is admitted that, had Marshall bought the land and pine on land direct from Hubbard, and the fraud alleged, and to prove which much evidence is taken and before the jury had appeared, then he could set up the shortage or damage as part failure of consideration, &c.

Suppose that, instead of a land or timber contract, Hubbard had come to Marshall with a chattel contract,—a chattel mortgage given by Gillen and Monroe on ten horses that they had purchased of Hubbard, and given the chattel mortgage back to secure payment therefor, and represented to Marshall that if he would buy the obligation against Gillen and Monroe he (falsely and fraudulently) would represent that these horses were all sound, 5 years old and seven feet high, each capable for work in a lumber camp.—Marshall, relying on this, takes an assignment of the chattel debt, and gives three notes of one thousand dollars each; and after he had paid one note and before the other notes are presented for payment, being compelled to take the property described in the mortgage, he finds that some of the horses were lame, halt and blind and of no value at the time of the representation. Could he not, as against the suit, on the remaining two notes, still in the hands of Hubbard, set up the

fraud which induced him to part with his promise to pay; or would he be met at the threshold of the Court with the declaration, "You did not purchase horses; you purchased notes and a chattel mortgage on some horses, and it makes no difference what false inducements were held out to you or how much you lose in the transaction, you cannot recover."

Is not the law this, that an action (or recoupment) lies for making a false and fraudulent representation, whereby another is induced to enter into a transaction, and by so doing sustains loss or damage?

Young vs. Hall, 4 *Georgia*, 95.
Irvin vs. Sherill, 1 *Taylor*, 1.
Patten vs. Gurney, 13 *Mass.*, 182.
Weatherford vs. Fairbank, 3 *Scam*, 170.
Fennimore vs. U. S., 3 *Dallas*, 357.
Smith vs. Mariner, 5 *Wis.*, 551.
Kelly vs. Sheldon, 8 *Wis.*, 258.
Miner vs. Medbury, 6 *Wis.*, 295.
Toby vs. McAllister, 9 *Wis.*, 463.
Barber vs. Kilbourn, 16 *Wis.*, 485.

A defendant, in case of a fraud, is entitled to a deduction of an amount equal to the difference between the value of the property, on the supposition of its corresponding with the representations and its real value.

Ward vs. Reynolds, 32 *Ala.*, 384.
Hinckley vs. Henderickson, 5 *McLean*, 170.
Bischof vs. Lucas, 6 *Ind.*, 26.
Smith vs. Smith, 30 *Vt.* 139.

Wiernier vs. Clement, 37 *Penn.*, 147.
Cecil vs. Spurger, 32 *Mo.*, 462.
Huckabee vs. Hutter, 10 *Ala.*, 657.
Groff vs. Hansel, 33 *Md.*, 161.
Withers vs. Green, 9 *How.*, 230.
Berker vs. Vrooman, 13 *John.*, 302.
Spalding vs. Vandercook, 2 *Wend.*, 432.
Culver vs. Avery, 7 *Wend.*, 380.
Whitney vs. Allaire, 1 *Comst.*, 305.
Van Epps vs. Harrison, 5 *Hill*, 69.

If a representation be made fraudulently for the purpose of inducing a party to enter into a contract, the party defrauded is entitled to avoid the contract, on the ground of fraud, and may recover back the price, notwithstanding a warranty of the same matter.

Street vs. Blay, 2 *B. & Ad.* 462.
Murray vs. Mann, 2 *Exch.*, 538.

Can it be said that the contract of Hubbard with Marshall was not for the sale of land and for the sale of pine on land, and so comes fully within the rule as to false representations made in relation to same to induce purchase?

Let us see now the case stated: Hubbard owns certain lands, valuable for the pine and timber thereon; their lumbering qualities constitute their value. Hubbard contracts to sell land, and pine timber on other land that the title is not to pass, to Gillen and Monroe, for a consideration of $9,808 in twelve equal quarterly payments of $817.33 each; the first payment to commence on the first day of August, 1873, and interest at the rate of ten per cent per annum on all payments,

with agreement on the part of Hubbard that when payments are completed, as specified in contract, he will convey 220 acres of the land named in contract to Gillen and Monroe or their legal representatives, except white oak timber on 80 acres of the 220 acres to be conveyed; and to relinquish all title and right to the pine timber only on 560 acres named in said contract and sold to Gillen and Monroe therein and with this express covenant in such contract, "and it is distinctly agreed and understood by and between the parties hereto that if the said parties of the second part, Gillen and Monroe, shall fail to make any of the payments of the purchase money above specified at the time and in the manner above specified, in such case this agreement shall be henceforth utterly void and all payments thereon forfeited, subject to be revived and renewed by the act of the party of the first part, or the mutual agreement of both parties." There was also a provision in the contract that one-fourth of all the moneys for the sale of the lumber and shingles manufactured and sold from the pine on these lands "shall be held by the purchaser or purchasers of the same, to be applied to the payment of the installments that shall become due next after said sale, or so much thereof as may be necessary to make such payment." This contract existed up to the 23d day of May, 1874.

According to the terms of it, there was then due on the same $3,269.32 not counting interest to that date. All that Hubbard says he had received to that date was $400, in taking out of the contract an 80-acre tract that was to be conveyed, and for which release he allowed Gillen and Monroe $400. This would not equal the accrued

interest to that date,—May 23, 1874. The original contract bears date of April 26, 1873, and draws interest on $9,808, at ten per cent per annum.—At this date Hubbard in effect, or rather in connection with Gillen and Monroe,—the mutual agreement of both parties—a new arrangement was made as to the sale and conveyance of 160 acres of land, and the pine timber on the 560 acres named in the Gillen and Monroe contract. On this 23d day of May, 1874, Hubbard says he heard there was a lot of shingles in Marshall's possession that came from these lands, and he went to get his,—claimed one-fourth of same.—Marshall declined to pay; claimed to have purchased them of Gillen and Monroe. Therefore, a new arrangement was made, whereby Marshall, in fact and in law, assumed the debt of Gillen and Monroe, and agreed to pay for the land and pine, and some other property, $10,058.30. Although the parties resorted to this roundabout way of an assignment of the existing contract, instead of making a new and direct contract for the land and pine, it was the effect and intent of all, that Marshall should pay so much money and have so much land, and so much pine of and from Hubbard: and to induce Marshall to make a cash payment and give his future obligations, the representations were made that, we claim, constitute the fraud in the case.

What was Marshall to receive for his cash payment and three notes, amounting to over ten thousand dollars, if it is said he took the obligation of Gillen and Monroe to pay Hubbard so much money for so much land and pine timber? Yet it became and was material to know how much pine there was on the land, in order that

Marshall could see if his security was good.

But we offer proof to show that it was something more than the obligation of Gillen and Monroe that was purchased, and for that purpose the evidence is allowed,—parole evidence of the surrounding circumstances,—to show the subject matter of the contract.

U. S. vs. Peck, 102 *U. S. Reports.*

It appears that Gillen and Monroe were willing and assenting to the transfer, and that Marshall was to have the pine for his use, and that Gillen and Monroe acted as Marshall's agents thereafter.

The doctrine of novation is here in force. The debt of Gillen and Monroe to Hubbard is extinguished. Hubbard takes a new debtor, and a new consideration passes. The transaction is based on figuring up the total debt of Gillen and Monroe and then discounting $1500, and Marshall taken for same. Could Hubbard enforce the debt against Gillen and Monroe?

Parsons on Contracts, vol. 1, *page* 217.

Abbott et al vs. Johnson, 47 *Wis.*, 239.

The evidence tended to show that Marshall was to have the land; that he did have the shingles already manufactured, and that even those Hubbard claimed; that unless Marshall would do something in the premises he (Hubbard) would take the shingles or one-fourth of same; that Hubbard did release Gillen and Monroe, and that Marshall paid and was to pay over ten thousand dollars for property that he realized and that was worth not much over six thousand dol-

lars; that to induce Marshall to assume the debt, a falsehood was told—fraud used—and the testimony tended to show the damage that followed, and still we are not to recover here.

Again we say, as we ask, if not against Hubbard, then against no one. And still it is the boast of the law, that for every wrong and injury done there is a redress. Is it not here, in this action?

T. R. HUDD,

Attorney for Plaintiff in Error.

117-415

U. S. SUPREME COURT.

STEPHEN HUBBARD,
Defendant in Error,

AGAINST

L. M. MARSHALL,
Plaintiff in Error.

Brief and Points by Defendant in Error on Motion to Dismiss Writ of Errror for Want of Jurisdiction.

J. D. MARKHAM,
Att'y for Stephen Hubbard, Defendant in Error.

SUPREME COURT

OF THE

UNITED STATES.

STEPHEN HUBBARD,
Defendant in Error,
AGAINST
L. M. MARSHALL,
Plaintiff in Error.

BRIEF AND POINTS BY DEFENDANT IN ERROR ON MOTION TO DISMISS WRIT OF ERROR FOR WANT OF JURISDICTION.

I.

This is an action brought upon two promissory notes in the United States Circuit Court, Eastern District of Wisconsin, by the defendant in error against the plaintiff in error, and judgment was rendered by said court in favor of the said Stephen Hubbard against the said L. M. Marshall, on the 2nd day of March, A. D., 1882, for the sum of six

thousand six hundred ten dollars and thirty-six cents ($6,610.36) damages and one hundred eighty-seven dollars and sixty-two cents ($187.62) costs and interest on verdict, and brought to this court on a writ of error duly filed in the clerk's office of the Circuit Court of the United States for the Eastern District of Wisconsin by the said L. M. Marshall, plaintiff in error, on the 1st day of July, 1882.

The last amended answer served and filed by the defendant Marshall in the said United States Circuit Court was duly verified by the said Marshall and only put in dispute in said action the amount of three thousand seventy-four dollars and fifty cents ($3,074.50). The first count in said answer of said defendant is in the words following, to-wit: "The defendant admits that he made and delivered the two notes in the plaintiff's complaint described, and made the payment thereon as endorsed on and as alleged in and by said complaint, and that plaintiff is now the owner and holder thereof." Said answer further states that said notes were given as part of the consideration and purchase price of two notes and a real estate mortgage and for the assignment and sale to the defendant by the plaintiff of a bond and the pine timber on land contract, then existing by and between the said plaintiff, the owner of the land and the timber on the land mentioned, and Hugh Monroe and Nicholas Gillen. That said land and timber was all situated in Brown county, Wisconsin. That to induce the defendant, Marshall, to make said notes the said plaintiff, Hubbard, represented, agreed, guaranteed and covenanted that there was then, viz: May 24th, 1874, standing, being or growing on the land so contracted three million feet of good, sound, merchantable pine timber and worth the sum of two dollars and fifty cents per thousand stumpage, and at that rate for said supposed guaranteed and agreed three million feet of pine on such land by the plaintiff and defendant to amount

to the sum of ten thousand fifty-eight dollars and thirty cents, placing the said land and timber at seven thousand five hundred dollars and the other notes and mortgage at the sum of twenty-five hundred fifty-eight dollars and thirty cents. That said defendant wanted said lands only for the said pine timber. That the land was described as follows (describing the land). That the plaintiff falsely and fraudulently represented and guaranteed that the said land contained and would yield and cut the amount of three million feet of good merchantable pine timber. That said representation was fraudulently made and untrue, as was well known to the said plaintiff, to induce the defendant, Marshall, to purchase the same That this defendant, before the commencement of this action, caused to be cut, hauled and taken from said lands said to contain the said three million feet of pine timber all of the pine timber thereon of every kind fit for use. That all the pine timber on said land when so sold to this defendant amounted to only one million seven hundred sixty-two thousand eight hundred and thirty-six feet and no more (1,762,836). That there is and was an ascertained shortage from the said three million feet so sold and contracted to this defendant of one million two hundred thirty-seven thousand one hundred and sixty-four (1,237,164) feet, of the value there and then of two dollars and fifty cents per "M," and amounting to the sum of three thousand seventy-four dollars and forty cents ($3,074.40), which sum the defendant claims to recoup or set off as a part failure of the consideration of said notes and that the same may be allowed him as against so much of the said plaintiff's claim herein. That the foregoing is substantially the whole of the said defendant, Marshall's, answer, and that the whole cause of action set forth in plaintiff's complaint was the two said notes. That in short the whole of plaintiff's demand was admitted by the answer

and only the sum of $3,070.40 set up as a defense or setoff, and no more, so that it is plainly admitted that the matter in dispute is less than five thousand dollars and that there is a clear and undisputed want of jurisdiction in this court, and it seems to me that the record need not be printed to ascertain that fact in this case.

II.

"A writ of error sued out on a judgment on a money demand will be dismissed where it affirmatively appears from the record taken as a whole, that the amount actually in dispute does not exceed five thousand dollars."

Gray v. Blanchard, 97 U. S. Sup. Ct. Rep., p. 564.

III.

Where the claim of the plaintiff which is more than five thousand dollars is all admitted (as in this case) except the sum of $3,074.40, the writ of error must be dismissed for want of jurisdiction.

Tintsman v. Nat'l Bank, 100 U. S. Sup. Ct. Rep., p. 6.

IV.

As to printing record, see National Bank v. Ins. Co., 100 U. S. Sup. Ct. Rep., page 43.

J. D. MARKHAM,

Attorney for Stephen Hubbard, defendant in error.

117-415

U. S. SUPREME COURT.

OCTOBER TERM, 1885.

NO. 110.

L. M. MARSHALL, Plaintiff in Error,

AGAINST

STEPHEN HUBBARD,

Defendant in Error.

BRIEF AND POINTS BY DEFENDANT IN ERROR.

J. D. MARKHAM,

Att'y for Stephen Hubbard, Defendant in Error

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SUPREME COURT OF THE UNITED STATES.

NO. 382--OCTOBER TERM, 1884.

L. M. MARSHALL,
Plaintiff in Error,
vs.
STEPHEN HUBBARD.

BRIEF AND POINTS IN ERROR BY STEPHEN HUBBARD, DEFENDANT IN ERROR.

I.

The plaintiff in error, L. M. Marshall, moved for a new trial in the Circuit Court of the United States for the Eastern District of Wisconsin, in this action, on the grounds—

1st. That the court erred in directing a verdict for the plaintiff herein.

2nd. That said verdict was contrary to the evidence.

3rd. That said verdict was contrary to law.

(See record, page 27, fol. 56.)

It is fair to presume that the same errors will be claimed in this court that were urged in the court below.

II.

We claim that the answer of the plaintiff in error on which this case was tried in the court below does not state facts sufficient to constitute a defence to the cause of action admitted by the plaintiff in error, even if taken as true, nor to any part thereof. The case was first tried in the state court at Green Bay, Wisconsin, on the answer of guaranty alone. (See an-

swer on pages 8 and 9 of record.) Which said answer in reference to said guaranty is in the words and figures following, to-wit: "That it was expressly agreed and understood by and between this defendant and said plaintiff, and said notes, mortgage and contract were assigned, sold to and received by this defendant, who had acquired the right of said Munroe & Gillin, and the said cash and notes made by this defendant were delivered on the said express understanding and agreement and guarantee, then and there made by said plaintiff, viz., on said 23rd day of May, 1873, that there was standing, being on, or growing upon the real estate named in said contract three million feet of good, sound, merchantable pine timber fit to be manufactured into lumber and shingles, and then and there, as this defendant avers, worth the sum of two dollars and fifty cents per M stumpage, and at no other rate the defendant and plaintiff figured the said supposed three million feet said to be on said lands to make up the consideration of said payment and notes aforesaid of $1,058.30; that the said plaintiff then and there covenanted and agreed that there was the full amount of three million feet of said pine timber on said lands, and further covenanted and agreed that if there was not that amount of timber on said lands, then this defendant was only to pay in proportion to the amount of timber that there was in fact on said lands at said rate of two dollars and fifty cents per M; that this was and is the sole and only consideration for said notes and for said payments; that this defendant, before the commencement of this action, caused to be cut, hauled and taken from said lands all of the said pine timber thereon of every kind fit for use; that all the pine timber on said land so taken amounted to one million seven hundred and sixty-two thousand eight hundred and thirty-six feet, and no more (1,762,836); that there is an ascertained shortage from the said three million feet of one million two hundred and thirty seven thousand one hundred and six ty-four feet (1,237,164), and for which amount, at the rate of two dollars and fifty cents per M, this defendant claims and

avers a part failure of the consideration of said notes, and that the same may be allowed him as against the claim of the said plaintiff in this action, and in reduction thereof; that this defendant has heretofore, and before the commencement of this action, paid to said plaintiff on said contract of purchase aforesaid and said notes the sum of six thousand seven hundred and twenty-three dollars and fifty-three cents, and that the said part failure of consideration amounts to the sum of three thousand seventy-four dollars and forty cents."

I introduce this answer for the purpose of showing that the question of fraud was an afterthought, and to further show that if at the time of commencing this action, the plaintiff in error and his learned counsel were ignorant of any fraud in the transaction. It is a little unfair to make the first discovery of fraud upon the suggestion of Justice Lyon in the supreme court of Wisconsin. In his opinion in this case, (see page 17, fol. 35 of record,) he says "the writings purport to state the whole contract, and in the absence of any claim of fraud or mistake they must be held to contain the whole contract."

III.

We claim that the evidence taken in this case in the state court is substantially the same as taken in the United States court, and the parol evidence is precisely the same, and if proper to be considered does not show a particle of fraud and does not even show that the plaintiff in error was damaged in the least in the transaction so as to have it chargeable to the defendant in error. The maxim of universal application is that fraud without damage or damage without fraud does not constitute a cause of action. It must appear from the evidence that the plaintiff in error has been deceived to his hurt and that the defendant in error has gained an advantage.

Fisher vs. Mellen, 103 Mass., 505.
Bing. on Sales, §429.
Cooley on Torts, 62.

IV.

If the same facts or statements which appear in the parol evidence on the part of the plaintiff in error had been incorporated in the writing and made part of the written contract, to-wit: the statement by defendant in error "that he would guarantee that there was three million feet of good merchantable pine on the land when in fact he knew that there was not that amount," which is the only statement claimed to have been made by the defendant in error which taints the transaction with fraud, and that falls to the ground because it must be admitted that he was not selling the land or timber or any interest in or to the same, because the contract or assignment shows clearly on its face that Hubbard had already sold the pine timber to Gillen & Monroe and could not sell it again for he did not own it nor claim to own it, and could only constitute a fraud without damage.

Noye vs. Merriam, 35 Vt., 438.
Medbury vs. Watson, 6th Met., 246.
Adams vs. Paige, 7 Pick,, 542.
Newell vs. Horn, 45 N. H., 422.
Randall vs. Hazelton, 12 Allen, 414.
Phipps vs. Buckman, 83 Ill., 25.
Castleman vs. Griffin, 13 Wis., 535.
Barber vs. Kilburn, 16 Wis., 485.

V.

It is admitted of course that this action was tried in the Circuit Court of the United States for the Eastern District of Wisconsin upon precisely the same written contracts between the parties that the case was tried upon in the state court of the state of Wisconsin and the supreme court of the state of Wisconsin held on appeal in said case that in the absence of fraud parol evidence could not be used to vary the written contracts of the parties. And Justice Lyon in his opinion in this case uses the following language (see record, pages 15, 16 and 17): "The rule that proof of antecedent or contemporaneous verbal agreement between the parties cannot be re-

ceived to alter or control their written agreement was applied in Underwood vs. Simonds, 12 Met., 275," and quotes from the opinion of Chief Justice Shaw as follows: "The rule of law is well established that parol evidence cannot be admitted to alter, vary or control a written contract nor to annex thereto a condition or defeasance not appearing on the contract itself. The rule is founded on the long experience that written evidence is so much more certain and accurate than that which rests in fleeting memory only that it would be unsafe, when parties have expressed the terms of their contract in writing, to admit weaker evidence to control and vary the stronger, and to show that the parties intended a different contract from that expressed in writing signed by them."

Hunt vs. Adams, 7 Mass., 518.

Curtis vs. Wakefield, 15 Pick., 437.

Morley vs. Wanford, 10 Barn. & Cres., 729.

St. Louis Perpetual Ins. Co. vs. Homer, 9 Whet., 39.

Justice Lyon further adds (see record, page 17, fols. 34, 35, 36): "The rule which allows the maker of a promissory note to show, in an action upon it, a failure or partial failure of consideration is not sufficiently broad to cover this case. Here we have written instruments which set out particularly the consideration of the notes in suit, to-wit, the assignment of notes and mortgages and of a contract to convey lands and to sell timber upon other lands.

"The right to prove a failure of consideration would admit evidence of the failure of consideration expressed in the writings as that the title to any of the property thus sold or assigned had failed, but does not go the extent of allowing proof of an additional consideration not expressed in the writings, and a failure thereof. To hold otherwise would be to destroy the rule which prohibits parol evidence to contradict or vary written instruments.

"The instrument signed by the plaintiff and accepted by the defendant, and the notes signed by the latter and deliver ed to the former, constitute an agreement in writing. The

terms of the agreement are clearly expressed, and the writings contain no clause from which it may be inferred that the parties did not intend to incorporate in them the contract just as it was made, and the whole of it. * *

"We conclude that the parol evidence to show that the plaintiff understood that the land should yield 3,000,000 feet of lumber, and promised to pay at a specified rate for the shortage, was erroneously admitted. * * Judgment reversed and cause remanded for a new trial."

50 Wis. R., page 322.

VI.

It is an old saying that it is only necessary to bark fraud and the courts will find it. Even that process must fail in this case for the simple statement in the second amended answer in this case, on which the trial was had from which this appeal is taken (see record, pages 23, 24, 25, commencing at fol. 50,) states: "That the plaintiff falsely and fraudulently represented and guaranteed that the said land contained and would yield and cut the amount of three million feet of good merchantable pine timber; that said representation was fraudulently made and untrue, as was well known to the said plaintiff at the time he made the same, and was so falsely and fraudulently made by him to induce this defendant to purchase the same, and pay the cash, and make the said notes; that believing and trusting in the said statement and representation as to the said amount of pine timber on said land, and solely induced thereby did this defendant make and deliver said notes and pay said cash; that this defendant has paid to said plaintiff on said contract price and on said notes aforesaid the sum of six thousand seven hundred and twenty-three dollars and fifty-three cents prior to the commencement of this action; * * that there is and was an ascertained shortage from said three million feet so sold and contracted to this defendant of 1,237,836 feet, of the value then and there of two dollars and fifty cents per M, and amounting to the

sum of three thousand seventy-four dollars and forty cents, which sum the defendant claims to recoup or set off as a part failure of the consideration of said notes, and that the same may be allowed him against so much of the plaintiff's claim herein."

Now there is no claim in the answer nor in the evidence in this case that the defendant in error is not fully responsible and an open admission that the plaintiff in error was fairly indebted to the defendant in error in the transaction for over seven hundred dollars, then where can the cry of fraud come from when the facts show, if permitted to be introduced in evidence, that it was a simple guarantee; and if the defendant in error had guaranteed the whole universe to the plaintiff in error, there would be no fraud when he had the universe on hand to deliver. And surely there is no need to charge fraud in this case unless there is a different agreement in writing between the parties that cuts off this pretended parol agreement. There is the rub. The written agreement must stand unless by some device it can be set aside.

VII.

Now that we have disposed of the pleadings, let us briefly examine the oral testimony in this case as given in the court below, and I claim that the statements made by the defendant in error to the plaintiff in error, as sworn to by the plaintiff in error and he details the whole transaction claimed to be fraudulent. And first I wish to call the court's attention to the fact that these oral statements were made at a different time and place from the one where the writings were made, and that it is not claimed by any witness that there was a word said between the parties at the time and place where the papers were made that was not embodied in the written agreement; and we claim that the words spoken were not fraudulent either with damage or without damage. The guarantee that is claimed that there were three million feet of pine timber on the land, even if Hubbard knew there were not that

amount, could not harm the plaintiff in error because he was not purchasing the timber nor any interest in it whatever; but if he had been purchasing the timber, the fact that Hubbard was agreeing to make good the shortage and was perfectly able and willing to do so, would show that there was no fraud and no intention to let the plaintiff in error suffer.

Even Mr. Marshall's own version of what was said before the written contracts were made does not show fraud or even a squinting at fraud (although wholly denied by Mr. Hubbard.)

After the writings were introduced in evidence on the trial in the court below, the plaintiff in error testified as follows: (Commencing at bottom of page 29 of record.)

"I had been advancing to them on their lumber and shingles and handled them on commission, advancing them money and supplies. He (Hubbard) came into my office and wanted to sell me the contract that he had with Gillen & Monroe, on the 23rd of May, 1874. I don't know as I can state all the conversation we had, only the summing up of it. We talked some little time. The first transaction we had, he said he wanted me to accept an order on Gillen & Monroe for quite a large amount, which I refused to do. When I refused to accept that order he wanted to have me buy the contract between Gillen & Monroe for the timber that was to be cut,—the contract offered in evidence. He made a proposition to me to throw off fifteen hundred from what was due him on the contract if I would buy it of him. My brother, James Marshall, I think was present at this interview. At that time he was clerking for me. We had this conversation in the office of my store. I don't think Gillen and Monroe were there at that time. Their names might have mentioned but the exact conversation I could not give you. Hubbard offered to throw off fifteen hundred from the contract if I would buy it, and then we went on to find out what I was buying. I asked Mr. Hubbard how much pine there was left on that contract he was selling me and his reply was there was three million good merchantable pine left to cut; and then we talked about

the value of the pine, how much the stumpage would be, and it was agreed between us two dollars and a half stumpage; that is the way I figured it up. I think at that time he offered to take ten thousand dollars for the contract. He said he would lump it right out at ten thousand dollars, or would figure it up and take fifteen hundred from what there was coming on the contract. My not knowing how much there was coming on the contract, I told him I would prefer to have it figured up; by his guaranteeing there was three million feet of pine on it I would take it; he said he would guarantee there was three million pine leit on the land that was to be cut; I told him I would take it at the fifteen hundred dollars discount from the contract with Gillen & Monroe. After we got through talking we adjourned then and went to Billing's office, and they made out the papers, and I made out the notes and they were consummated there.

"Q. Was there any further agreement or understanding after you got to the lawyer's office, or was that all had in the store?

"A. All had in the store; there was nothing said about the contract in the office; only just it was transferred to me.

"Q. What was said, if anything, in relation to what you were to purchase from him, how much you were to pay him —how much you were to pay him in the first place?

"A. We didn't know how much the purchase would amount to at that time; it was not figured up; they figured it up over to Billing's office; there was something said about a tract of land that was to be reserved, that was not to be put into the contract—that was in the contract, but was not to be put in the contract transferred to me.

"Q. Who talked about reserving that?

"A. Mr. Hubbard. He said he wanted to reserve that part of the land and transfer the balance to me. I gave three notes and made a cash payment, which was twenty-five hundred and something. Three notes were given, payable in six, twelve and eighteen months. The entire sum agreed upon to

be paid was ten thousand and some odd dollars. It figured up the same as the contract, deducting fifteen hundred dollars; I don't recollect the exact amount; ten thousand and fifty odd dollars. The fifteen hundred dollars was subtracted, leaving ten thousand and fifty. I figured the three million of pine, $2.50 a thousand, $7,500; then there was the mortgage on the mill of one thousand dollars, and another mortgage of Monroe or a note there had been some paid on; I don't recollect the exact amount; I didn't consider it a note good for anything; Monroe was not able to pay it.

"Q. How did you come to pay the $2.50?

"A. I considered the stumpage of that value, and I think Hubbard assented to it. He knew we were figuring at $2.50 a thousand.

"Q. Was there anything said by Mr. Hubbard—anything about if it should fall short of three million?

"A. He said he would make it good. I asked him if he would give me time to find somebody to go and look over the land and examine the timber. He said he would not, it must be closed right up that day or he should proceed to take possession of it, or something of that kind. I had not been on the land before.

"Q. Had you any way of ascertaining, except from Mr. Hubbard, the true state of the quantity of timber upon that land?

"A. I had not. I knew nothing about it, only what I got from Mr. Hubbard. I was then dealing in pine timber, shingles and lumber, and knew the general market. That quality of pine, located where that was, was worth $2.50. I would have paid that for any amount I could have got.

"Q. What was the amount paid on the contract before the commencement of this suit?

"A. Six thousand seven hundred and twenty-three dollars. I had Gillen & Monroe go on and cut the timber off and saw it up.

"Mr. Markham to the witness: Did you or did you not, re-

ceive the original title of the mill property from Gillen & Monroe?

"A. I took the mill of Gillen & Monroe. I took no deed of it. I took the mill and sold it, but not under the mortgages. They consented to let me have it if I would settle.

"Q. They had the original title subject to the mortgage; did you take that title?

"A. The mortgage was in my hands; I did not foreclose the mortgage; I don't know but they gave me a bill of sale of it. If they gave me a bill of sale, I think it was put in my safe; it is not here."

(Resumed on page 35 of record.)

"The only thing that induced me to buy this contract was Mr. Hubbard's guaranteeing there were three million of pine on it. If he had not guaranteed that I would not have bought it at all. I believed his statement. I relied on Hubbard's guarantee there were three million feet of pine upon the land; I bought relying upon his statement. By actual scale there was one million seven hundred and sixty-two thousand eight hundred and thirty-six (1,762,836) feet on the land. * * The market value of pine was $2.50. I have known the market there for years. I have been dealing in that commodity for twenty years or more. That was also the rate at which Mr. Hubbard and I figured the value of the pine. I have not received in any form, from any party or persons, Gillen & Monroe or anybody, any sum for what I claim I lost by reason of the shortage on the pine. A year or so ago I suffered a slight paralytic shock, and my memory has not been as good, compared to former times, since then. Gillen was present at a portion of this interview preceding the contract. There was conversation between me and Gillen in the presence of Mr. Hubbard, as to the quantity of pine upon this land, before I went to consummate the bargain and while we were negotiating. Gillen, myself and Hubbard were in the store. We were in the office, I think. I turned to Gillen and said: 'How much pine is there on that land, Hubbard said there are

three million?' and Gillen made the same reply he had before: He didn't know; he hadn't been over the land to estimate, but there might be three million and there might not.

"Q. What reply did Hubbard make when you made that statement that Hubbard had said there were three million?

"A. He kept silent. He neither affirmed nor disaffirmed. He was right there at the time. That was after Hubbard had made the statement to me as to the amount.

"Q. Gillen & Monroe made no objections to your purchasing this contract and assuming the obligation to take the pine off it?

Objected to as immaterial. Objection sustained. Exception.

"Witness: No objection was made by any of the parties to my assuming this contract and taking the price. Gillen & Monroe knew of the fact I was negotiating to purchase. They took off the pine for me, acting as my agents. I directed them to do so.

Cross-examined:

"Q. How long have you been in business in Green Bay?

"A. Ever since 1851.

"Q. How long did you know Gillen & Monroe?

"A. I could not tell exactly the time I got acquainted with them. I think the first time Hubbard brought Gillen in and introduced him to me he was buying pine and putting up a mill; it was two or three years, it might have been four, before this.

"Q. During the three or four years were you dealing with them in pine lumber and shingles?

"A. Yes, sir; and they were manufacturing lumber and shingles at or near the same place spoken of in this transaction on the lands described. Monroe had a contract; he was not in partnership with Gillen.

"Q. You were aware when you purchased this contract, took this assignment, that it was relative to the same property they had been working on for two or three years, and you had been handling a portion of the time the lumber and shingles for them. You now understand it is the same place?

"A. Yes, sir; I know nothing to the contrary.

"Q. About what distance from Green Bay was that land and that mill spoken of by you in your testimony?

"A. My impression is it is about 11 or 12 miles. I would not be positive about the distance.

"Q. And on the ordinary traveled road leading from Green Bay?

"A. Part was; they had to turn off from the road to go to the mill.

"Q. About what distance from the main road is the mill?

"A. I should judge about three or four miles; I don't know; that would be my estimate of it.

"Q. Is the land from Green Bay toward the mill more or less, and cultivated as farms?

"A. Yes, sir; most of the way.

"Q. What amount of shingles and lumber was in your possession at the time of this interview, spoken of by you with Hubbard at your store, belonging to Gillen & Monroe?

"A. I could not tell without looking over my books. Not knowing I should be required to tell anything of the kind, I have not posted myself up. I have a record of it on my books but have nothing here to refresh my memory in regard to it.

"Q. Was there a considerable amount of lumber and shingles in your possession at the time Hubbard called upon you?

"A. Yes, sir; there was some we hadn't shipped; some out at the mill and some on the track had been delivered to us and we had given our receipt for it.

"Q. Are you able to state what shingles were worth per thousand at the time that Hubbard called upon you?

"A. Not the exact amount, without looking at my books; it is several years ago; I don't keep market reports in my head for a number of years back; I have a record of it on my book; what I was paying and what I was selling them for I could not state now.

"Q. You may state about, during the year 1874, the market price, if you recollect.

"A. Between two and three dollars, somewhere; just the amount I could not tell; shortly after that they went below that; the price of common lumber that year was in the neighborhood of eight dollars; I think about the best lumber Gil len and Monroe were making there was something like $20.

"Q. When Hubbard came to you, he was wanting you to accept a draft, or check, order, or something on Gillen & Monroe; he wanted to get pay from you on his claim against Gillen & Monroe?

"A. Yes, sir.

"Q. Have you any idea what amount of money he was wanting?

"A. No, sir; I sent for Gillen and Monroe to come in; Gillen did come in.

"Q. At what time, either in conversation with Hubbard or Gillen and Monroe, did you learn what his demand in amount was?

"A. I don't think I did the exact amount.

"Q. Did you, at that time, learn there was an amount due from Gillen and Monroe to Hubbard?

"A. Yes, sir; but the exact amount I could not tell you; he threatened to attach them, or something of that kind. The shingles were in my possession; I claimed they were mine; I don't remember hearing any statement about any lien; there might be and might not; I read what was in the contract.

"Q. And when Hubbard informed you he wanted pay upon a draft or order, or something from Gillen and Monroe, you then sent for them?

"A. I sent for Gillen—I sent for them both; they were at their mill; I think the same day that Hubbard called upon me and presented this claim; they might not have come in that day; Hubbard had been there some little time, and we had several talks in regard to it; I think it was the same day that Mr. Hubbard made this demand; I sent out for him—in the morning, I think; I cannot positively state whether Gillen came in on that day or not.

"Q. I ask you for your best recollection on that point. Have you not already stated that Hubbard, from the first, insisted upon great rapidity and dispatch about this matter, and that he came to your office or store in Green Bay and refused to give delay, and that he was only there twice?

"A. That was the time we made the final contract—that I bought the contract.

"Q. Have you at one time stated, on the trial of this cause, before, that he was only, in reference to this matter, at your store twice, and that during the same day?

"A. I think I did state he was there there twice; my recollection was at that time twice; he may have been more, but I cannot say in regard to it; I think he was in there two or three times that day—the day we finally consummated our trade.

"Q. At his first interview with you, at or about what time of day was it?

"A. I think in the morning.

"Q. At the time he first came in the morning, do you recollect now who was in the store when he came there?

"A. I don't.

"Q. Do you recollect of any particular person besides yourself and Hubbard?

"A. I think my brother was in the store when he first came in.

"Q. And when Hubbard first came in did he make any other errand, or speak of any other business, except he wished to get some pay from you on his claim he had against Gillen and Monroe?

"A. I think he spoke about selling me the contract; wanted to have me buy it at that time.

"Q. Have you a distinct recollection of what he said about it on the first interview—in reference to your buying his contract; recollect what he said in reference on your first interview to your purchasing this contract?

"A. Not all; only he made an observation I had better buy

it; he was a good ways off; I could look after it better than he could.

"Q. That was about the whole of it on the first?

"A. Yes, sir.

"Q. You refused to pay him any money?

"A. Yes, sir; I did at the time.

"Q. But immediately dispatched a messenger to the mill for Gillen, so as to be instructed in the matter as to what you should do?

"A. Yes, sir; I wanted to consult with them.

"Q. About what time after you were first called upon by Hubbard was it until he left? how long was he in your store at the first interview?

"A. As near as I can recollect, some little time; it might have been a couple of hours, it might have been an hour; then he went away; that is my recollection; I don't recollect of his going away with any one; my impression is he went away alone; I did not see any one go with him.

"Q. Do you know how he happened to return to your store on the second interview?

"A. I think Gillen asked him to come back; I have no recollection of asking Gillen to go for him to ask him to come back; I might, but I am not distinct in regard to it; I had some little talk with Gillen in regard to it; I think I asked him what I had better do in regard to it. He said he didn't know hardly what I had better do; he said I could do just as I had a mind to; that he did not want to advise me one way or the other about buying the contract.

"Q. Did you then remark to him that he had better find Hubbard and bring him in?

"A. I might; I am not sure in regard to that; I would like to have some further conversation with Hubbard in regard to it before I did anything.

"Q. How long after the first interview was it before Hubbard returned to your store and you had the second interview?

"A. My impression is it was the next day; I think it took

about all that day to get Gillen in; it is quite a distance out there, and a pretty hard road.

"Q. At what time did Hubbard come to your store for the second interview?

"A. That was in the morning, I think—that is my impression—about nine or ten o'clock.

"Q. At what interview did anybody come with Hubbard when he came there?

"A. I am not sure whether Gillen came in with him or not; I think Gillen was in the store while he was; I am not sure whether they came in together or not; I don't recollect whether any one came in with him; know he walked very slowly, and generally a man would not stop to walk with him, it took him so long to get across the store; he was lame with rheumatism.

"Q. At this interview did he tell you how much his claim was against Gillen and Monroe?

"A. I am not sure whether he told me at that time or not.

"Q. At either of the conversations, or during the negotations for the transfer of this contract to you and these mortgages, were you informed of the amount of Stephen Hubbard's claim against Gillen and Monroe?

"A. Yes, sir; I was.

"Q. What was it in amount?

"A. Something over ten thousand dollars; something over eleven thousand dollars, I think, the whole thing fiured up.

"Q. And for the purpose of taking Mr. Hubbard's contract into your hands, and those notes and mortgages, did you then and there announce to Mr. Hubbard that your object in making the transfer was for the purpose of aiding Gillen and Monroe?

"A. Yes, sir; I did. After we had taken up our bargain and got it all consummated he remarked we would go to his lawyer's and let him transfer the contract.

"Q. Do you recollect now that the very words you stated

were uttered by Mr. Hubbard as you stated them, 'We will go and have the transfer made'?

"A. I am not sure of the exact language; it was something to that effect.

"Q. Do you recollect there was anything said except you would go to a lawyer's office to have the writings made; was not the language used, 'We will now go and have the writings made'?

"A. It was something to that effect; something led us both to go there; I am not sure what exact time of day it was; it is a good many years ago; I should say it was in the afternoon, as near as I can recollect.

"Q. Did any other person accompany Mr. Hubbard and yourself to the lawyer's office at the time you went to have the writings made?

"A. I think not.

"Q. Where did you go to have the writings made?

"A. To Billings' office; Hubbard and I went there; Billings wrote the assignment; I did not consult any attorney at all; it was all done by Mr. Billings.

"Q. How long afterwards were the papers brought to you?

"A. I could not state; it might have been three, it might have been six, months; they were left, in the first place, until he could consummate certain things, as he understood it, and then the papers would be delivered to me.

"Q. And you took them?

"A. Yes, sir.

"Q. This assignment and land contract are the papers you speak of?

"A. Yes, sir; and notes and mortgages.

"Q. The papers were read over, I suppose, after they were written and signed, in your presence?

"A. Yes, sir; I gave the notes and paid over the money that I was to pay in money; that was on the 23rd day of May, 1874, the date of these notes. From that time on Gillen and Monroe continued to cut timber and manufacture it into lum-

ber and shingles, at the mill aforesaid, as they had before.

"Q. Without any immediate arrangement or change between you and them—for how long?

"A. Until they cut up what timber there was on the land; two seasons, I think, they were cutting it up; the first season they commenced they didn't have much snow; the next season they cut up all what there was; I let them cut it off as my agents.

"Q. You made no arrangement, in writing or otherwise, for two years after Mr. Hubbard assigned, or until the 19th of April, 1876?

"A. We had no writings, and I continued to handle the lumber and shingles, allowing them so much a thousand for cutting."

Re-examined:

"Q. Something has been said about Hubbard's claiming a lien upon those shingles or lumber. What do you know about that, or what is there about it?

"A. I did not know he had any lien on them; the shingles were put into my possession, and I had given a receipt for them to pay up Gillen's and Monroe's debts—what I had advanced them.

"Q. Whose shingles were they?

"A. Mine, and I had more than paid for them.

"Q. Had the trade or transaction you had with Hubbard anything to do with those shingles, or what you would do or receive?

"A. We did not take them into account at all; it entered into no part of the negotiation at all; I had a verbal arrangement with Gillen and Monroe to go on and cut off this pine land and ascertain what there was upon it; I gave Gillen and Monroe directions to go on and cut off the pine and keep correct account of what there was upon it, and report to me, which they done—manufactured it into lumber and shingles at their mill. The lumber and shingles were delivered to me. I made these arrangements with them right away after I

bought the contract. I do not recollect seeing Mr. Hubbard until he came to settle some time afterwards. There was one note paid; I had paid it to Hubbard. At the time I paid the first note they had not cut off the pine yet. The winter after I bought this we had no snow. They did not finish it up the first season. I told Hubbard I wanted to see Gillen and find out how they stood. He claimed they owed him a great deal. I didn't know anything about it; I wanted to consult him to see what I had better do. Hubbard understood, and so did I, that I wanted this land or pine for Gillen to cut up for the mill. That was talked between us. Gillen was to cut it up for me. Hubbard made no objection to that; he seemed to desire it should be done. He made the remark that he hoped they would come out all right. I told him I hoped so too, and I think they would if there had been three million feet of pine on it.

"Q. Counsel says he thinks it was nothing to you whether they came out right or not; was it?

"A. Yes, sir; a good deal.

"Q. You say Hubbard in the first place came to you to get you to pay some money for Gillen and Monroe. What did he claim your relations were with Gillen and Monroe and why did he come to you?

"A. I don't know; he wanted me to pay it for Gillen and Monroe.

"Q. Did he say why?

"A. No, sir.

"Q. Did he say anything about your having the lumber and controlling and managing it?

"A. Yes, sir.

"Q. What?

"A. I don't recollect what he did say in regard to it.

"Q Did he seem to know you were to handle this lumber and pine and have the benefit of it?

"A. Yes, sir.

"Q. Before this arrangement was made?

"A. Yes, sir.

"Q. When did you first ascertain that the shortage existed—about what time?

"A. When they got through cutting it off. In 1876, I think; during the winter of 1876.

"Q. When did you first have any interview or talk with Hubbard about the shortage, if any?

"A. When he came in to collect the pay for the last two notes; in my office in Van Dyke's store. When he first came in I think I had an account that he had guaranteed against Hugh Monroe—not Monroe, but Ballou; he was belting the mill; I had furnished him the belting and Hubbard had guaranteed to pay for it, and he figured up the interest on the notes; I told him about this account; he handed me the note and I endorsed it on it; then he commenced figuring again; I told him there is another thing, the shortage on that pine; figure that up; then Hubbard jumped up, and got mad, and ran out of the office, and didn't say anything more about it; and he said he would sue me, or something of that kind, right off; I told him there was a large shortage; I wanted to have him make that up, as he agreed, and he refused to to do it; I told him I was ready to pay the balance of the note when he would allow me for the discrepancy on the pine; he didn't say much; ran out of the office as fast as he could; he refused to allow it.

"Q. Have you had any talk since then about it?

"A. I don't recollect whether we have or not; he never said anything to me, or I to him, since that interview, until the commencement of this suit."

Recross-examined:

"Q. The guarantee for that amount you endorsed on the note for belting, he made no objection to that?

"A. No, sir.

"Q. Do you recollect what that amount was?

"A. Nine hundred and some odd dollars; it is endorsed on the note.

"Q. Was this at, or about, the time the last note was due—six, twelve, and eighteen months from March 22nd, 1874?

"A. I think they were past due a little; that is my impression; I am not sure; I don't think he came there as soon as they were due.

"Q. Can you recollect about how long after they were due he came for his pay?

"A. I can't say.

"Q. You have never mentioned this in court before, about this guarantee about the belts?

"A. No, sir; I don't think I have.

"Q. About what time did he make that guarantee to you to pay for the belts of Ballou?

"A. At the time Ballou got it; I don't recollect the date of the transaction myself; I could tell by looking on the books.

"Q. Were the notes due, or about due, at the time he made that guarantee for Ballou's belting?

"A. No, they were not due; I don't know how long they had to run.

"Q. How long did the debt run for the belting before it was endorsed on the notes?

"A. It was some little time; I dont know exactly; it might have been a year, it might have been six months; I could not tell without looking at the books; it might have been only three months; I am not positive about that; at the time the guarantee was made by Hubbard, it was understood it should be applied on these notes.

"Q. At the time the guarantee was made by Hubbard, was the amount of the guarantee named, how much it would be for?

"A. I think he limited it to one thousand dollars; that he told me to let him have the amount of one thonsand dollars.

"Q. And you did?

"A. It fell a little short of that; I let him have what he wanted up to that.

"Q. That was the first time you ever intimated to him there was any shortage?

"A. Yes, sir.

"Q. At the time you got that endorsement made?

"A. Yes, sir.

"Q. That was some two years and upwards after the time you took the transfer of the notes and mortgages?

"A. It was the first time I saw him after I found out.

"Q. That endorsement of the note was made in 1876?

"A. The date I don't recollect exactly; I think some time in 1876.

"Q. When you were sworn before on the trial of this case at Green Bay, in the state court, did you testify in the follow ing words: 'Hubbard stated to me at that interview that he would warrant that there were t ree million feet of pine timber upon the land described in the contract; that he would warrant it to be that, and that in case it fell short, he would pay me back $2.50 a thousand,' &c. Did you testify that was the agreement?

"A. Yes, sir; that is a correct statement of what did actually transpire at that time.

"Q. You have, as I understand you, at some time since the transaction, surrendered all your claim against Gillen & Monroe, settled with them, lumped it up and let them go?

"A. Yes, sir; they turned out all they could. I had a chance to sell the mill, and I told them if they would give me a bill of sale of the mill I would give them a receipt and let them go.

"Q. Do you remember what amount you put in the receipt?

"A. Five thousand dollars.

"Q. Do you remember when that was?

"A. I could not, without looking at the deed; it was on or about the 17th of April or the 19th of April, 1876.

"This agreement, as you state, was an oral agreement or talk; you had it all before you made any writings in reference to the guarantee, the talk at your store?

"A. Yes, sir.

"Q. About how long before the writings were made?

"A. I think the same day.
"Q. But a little while before?
"A. Yes, sir."
Re-examined:

"Gillen and Monroe were owing me ten thousand and some odd dollars, $10,916.25, at the time of the settlement in 1876; I had a settlement with them about April, 1876, at which time a receipt was given."

(Receipt identified and offered in evidence by defendant, and marked "Exhibit No. 3.")

"I wanted to get possession of the mill; I only had it as a mortgage; I had to go to work and foreclose; I had a chance to sell the mill; I wanted to dispose of it and get all I could out of it; they said they had nothing but the mill. I said, 'You can call the mill what you have a mind to—five or ten thousand dollars; if you will give me a bill of sale of the mill so I can sell it, I will give you a receipt in full.' There was a bill of sale executed.

Bill of sale identified and offered in evidence by defendant and marked "Exhibit No. 4." (Bill of sale dated April 19th, 1876, the same day as the receipt.)

"Q. What was the mill worth you got from them in settlement, for which you gave them credit for $5,000?

"A. I sold the mill to Woodruff for one million Star A shingles and five hundred thousand No. ones. They called the Star A shingles worth $2.50; they were worth $2.50 a thousand, and the No. ones a dollar; the aggregate was worth $2,500. The mill was not worth any more than that; we could not have sold it for that a year afterwards; I could not have sold it for cash anyway.

"Q. Then, as I understand you, what you realized from this mill is the premises covered by the two mortgages you bought at the time you bought the land contract?

"A. Yes, sir; I realized $2.500, and for that I released them from a debt of $11,000 nearly. That mill was covered by these two mortgages, and that was done to save the expense of foreclosure."

Recross-examined.

"Q. When you say you settled everything with them, you have never yet taken any transfer of that land from any one, have you?

"A. No, sir; it stands just as it was.

"Q. The contracts outstanding in their behalf yet?

"A. Yes, sir; it is a contract just as it was."

Now, the foregoing is the evidence, and the whole of the evidence of the plaintiff in error, given on the trial of this action.

The defendant in error denied on his oath, on the trial, every word of said testimony of Marshall in reference to the oral guarantee that there was three million feet of pine on the land named in the contract assigned by Hubbard to Marshall.

There is not a word of evidence in the whole case going to show fraud on the part of Hubbard, even if he had sold Marshall the land. How does it appear from the evidence that Marshall is in condition to say that he has lost anything from any one, either Hubbard or Gillen and Monroe? Has he sued Gillen and Monroe on the contract he purchased of Hubbard, obtained judgment, issued his execution and had it returned unsatisfied? How is the court to listen to him until he shows that he has provided properly to get his pay, even if we had guaranteed the payment of the contract on the part of Gillen and Monroe? Nothing of that kind is even set up in the pleadings, and it seems to me it was necessary to aver those facts in order to constitute a defence in this action; and I cannot see that it appears by the pleading or evidence or by any allegative presumption or inference that at the time this action was brought the plaintiff in error had suffered any damage whatever by reason of the alleged misrepresetations of the defendant in error.

Can it be said by any fair construction that the assignment from the defendant in error, Hubbard, to the plaintiff in error, Marshall, and found on page 66 of the record, needs any explaining by parol evidence to show its meaning? Justice

Lyon of the supreme court of the state of Wisconsin says in his opinion in reference to that assignment (see opinion commencing on page 17, folio 35, of record): "The instrument signed by the plaintiff and accepted by the defendant, and the notes signed by the latter and delivered to the former, constitute an agreement in writing. The terms of the agreement are clearly expressed, and the writings contain no clause from which it may be inferred that the parties did not intend to incorporate in them the contract just as it was made, *and the whole of it.* There is no claim of mistake or suggestion of fraud. The writings purport to state the whole contract, and in the absence of any claim of fraud or mistake, they must be held to contain the whole contract."

That instrument is in the words and figures following, to-wit: (See Exhibit No. 1, page 66 of record.) "For and in consideration of ten thousand and fifty-eight and 30-100 dollars, to me in hand paid, I, Stephen Hubbard, of Manitowoc county, Wisconsin, do hereby sell, set over, and assign unto L. M. Marshall, of Green Bay, Wis., a certain mortgage executed by Hugh Monroe to said Stephen Hubbard on the first day of March, 1872, upon real estate in said mortgage described, together with the notes therein referred to, one of said notes having an indorsement thereon of five hundred dollars, and which said mortgage is recorded in volume 18 of Mortgages, on page 591, in the office of the register of deeds of the county of Brown. To have and to hold the said mortgage and the debt thereby secured to the said L. M. Marshall, his heirs, executors, and assigns, forever. And I do also sell, set over, and assign unto the said L. M. Marshall all my interest, right, and title in and to a certain mortgage executed by Hugh Monroe to Nicholas Gillen on the first day of March, 1872, which said mortgage was recorded in volume 18 of Mortgages, on page 590, in the office of the register of deeds of the county of Brown, the interest of said Stephen Hubbard being expressed in an assignment from said Nicholas Gillen to said Stephen Hubbard on the 21st day of June, A. D. 1873, which

said assignment is recorded in the office of the register of deeds of Brown county, in volume 22 of Mortgages, on pages 17, 18 and 19. And the said Stephen Hubbard does hereby sell, set over and assign unto the said L. M. Marshall all his right, title and interest in and to a certain contract executed and entered into by and between the said Stephen Hubbard, Nicholas Gillen, and Hugh Monroe, which said contract is dated on the 23rd day of April, 1873, the said Stephen Hubbard hereby reserving the right to foreclose and enforce the covenants contained in said last-mentioned contract in his own interest and behalf in case of default in the payment of either of three certain promissory notes executed this day by L. M. Marshall aforesaid to Stephen Hubbard in the sum of two thousand five hundred and seventeen dollars and fifty-eight cents each, and further excepting and reserving out of said contract the west half of the northeast quarter of section number eleven (11), in township number twenty-two (22) range twenty-one (21) east, and upon the payment of the said three notes the said Stephen Hubbard is to convey the northwest quarter of section number twelve, in town number twenty-two, range twenty-one east, as in said contract covenanted. This assignment of the mortgage and contract herein described, being upon this express condition: that the said three promissory notes executed by said L. M. Marshall to the said Stephen Hubbard in the sum of two thousand five hundred seventeeen and 58-100 dollars each, due respectively in six (6), twelve (12) and eighteen (18) months from date, be paid when matured, then this assignment to be valid; but in case of default in the payment of said notes, or either of them, then this assignment to be void and of no effect, said mortgages and contract, in the meantime, to be left in the custody of Billings & Huntington, attorneys, in Green Bay, Wisconsin.

"In witness whereof, I have hereunto set my hand and seal, this 23rd day of May, 1874.

"STEPHEN HUBBARD. [SEAL.]

"In presence of H. J. HUNTINGTON and L. J. BILLINGS."

The contract assigned by the foregoing assignment is in the words and figures following, to-wit: (See page 67 of record, Exhibit No. 2.)

"This arrangement, made and concluded this 26th day of April, A. D. 1873, by and between Stephen Hubbard, of the county of Manitowoc and state of Wisconsin, party of the first part, and Nicholas Gillen and Hugh Monroe, of the town of New Denmark, Brown county, in said state, parties of the second part, witnesseth:

"That the said parties of the second part hereby agree and bind themselves and legal representatives to pay, or cause to be paid, to the said party of the first part, his heirs or assigns, in the sum of nine thousand eight hundred and eight ($9,808), in the manner following: In twelve equal annual payments or installments of eight hundred and seventeen and 33-100 dollars each, to-wit: The first payment to be made on the first day of August, A. D. 1873, and one payment of eight hundred and seventeen and 33-100 dollars every three months thereafter until paid, to-wit: on the first day of November, 1873, on the first day of February, May, August, and November, 1874, and on the first day of February, May, August, and November, 1875, and on the first day of February and May, 1876; the said payments to be made to the party of the first part or to his order, and the same being intended to apply, when fully completed, as the purchase-money of the following tract, piece, or parcel of land, to-wit: the west half of northeast quarter of section number eleven (11) and the northwest quarter of section number twelve (12), all in town number twenty-two, range number twenty-one east, excepting and reserving to the said party of the first part all the white oak timber standing, lying and being on said west half of the northeast quarter of section eleven (11) aforesaid, and also to apply as the purchase money of the pine timber and the whole thereof now standing, lying, and being on the south half of section number twelve (12), in town number twenty-two, range number twenty one (21) aforesaid, which said pine timber is

to be cut and taken off in accordance with contracts hereto fore made in the sale of said land, and also before the time has run on tax titles; and further, said payments are intended as the purchase price of the pine timber and the whole thereof now standing, lying or being on the east half of the northwest quarter of section number eighteen, town twenty-two, range twenty-two east, and on the west half of the southeast and the east half of the southwest quarter of section number eleven, town twenty-two, range twenty-one east, all of which above-described lands are situated in the county of Brown, Wisconsin.

"The said parties of the second part hereby agree and covenant that all the pine timber that is cut on said lands is to be manufactured at the mill now being built on the old site of the mill formerly owned by Hugh Monroe, in the town of New Denmark, in said county.

"And said parties of the second part further covenant and agree that one-fourth of all moneys for the sale of the lumber and shingles manufactured and sold shall be held by the purchaser or purchasers of the same, to be applied to the payment of the installments that shall become due next after said sale, or so much thereof as may be necessary to make such payment.

"It is hereby understood, covenanted and agreed by and between the parties thereto that the title to all of said property is to be, and remain in, said party of the first part until the payments of said principal sum and interest shall be fully made. The said parties of the second part further agree and covenant that will pay all taxes, special or general, which may be assessed on the west half of the northeast quarter of section number eleven and the northwest quarter of section number twelve, town number twenty-two, range twenty-two, aforesaid, from and after the date hereof, whenever such taxes shall become due and payable by law, until the aforesaid purchase-money be fully paid in the manner above stated, and also to hold said premises from the date hereof as the tenant

at will or sufferance of the said party of the first part, subject to be removed as tenant holding over by process under the statute in such case made and provided, whenever default shall be made in the payment of any of the installments of purchase-money above specified, and also to keep the buildings, fences and improvements on said premises in as good repair and condition as they now are, except ordinary wear and decay and damages by the elements. The said party of the first part hereby agrees and binds his heirs, executors and administrators that in case the aforesaid sum of nine thousand eight hundred and eight dollars, with the interest, shall be fully paid at the times and in the manner above specified, he will relinquish all right, title or claim to the timber standing, lying and being on said lands, except the white oak timber above expressly excepted, and will, on demand thereafter, cause to be executed and delivered to the said parties of the second part, or their legal representatives, a good and sufficient deed in fee-simple of the west half of the northeast quarter of section eleven and the northwest quarter of section twelve, all in town twenty-two, range twenty-one, in Brown county and state aforesaid, free and clear of all legal liens and incumbrances, except the taxes herein agreed to be paid by the parties of the second part and the white oak timber expressly excepted.

"And it is distinctly agreed and understood by and between the parties hereto that if the said parties of the second part shall fail to make any of the payments of purchase-money above specified, at the time and in the manner above specified, in such case this arrangement shall be utterly void and all the payments thereon forfeited, subject only to be renewed by the act of the party of the first part or the mutual agreement of both parties.

"And it is further understood and agreed that all the pine timber on the east half of the northwest quarter of section 18, town 22, range 22, and west half of southeast quarter and east half of soutwest quarter of section 11 and south half of sec-

tion 12, town 22, range 21, to be cut and manufactured into shingles and lumber before any is cut on the west half of northeast quarter of section 11 and northwest quarter of section 12, town 22, range 21, aforesaid; and it is further covenanted and agreed that all the pine logs and timber now lying and being in, upon and about the mill yard of the parties of the second part, and which are cut and hauled from section 12, town 22, range 21, shall be subject to all the conditions of this agreement.

"It is hereby mutually agreed that the interest to be paid by said parties of the second part on the purchase-money hereinbefore mentioned shall be at the rate of ten per cent. per annum and to be due and payable annually on the whole amount unpaid.

"In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written.

"STEPHEN HUBBARD. [SEAL.]
"NICHOLAS GILLEN. [SEAL.]
"HUGH MONROE. [SEAL.]

"In presence of G. KUSTERMANN."

Now, is there anything in the foregoing contract that Hubbard could sell to Marshall except the obligation for money, which was then outstanding and due and to become due and payable to Hubbard or his assigns, with the authority to Marshall to collect and use same in the same manner that Hubbard could have done? and is it not patent on the face of the paper that he, Hubbard, had already sold the pine timber to Gillen & Monroe? and did Marshall know the contents of the paper outside of any statement of Hubbard's, and did he know that Gillen & Monroe were on the land manufacturing the said pine timber into lumber and shingles, claiming to own it? On page 37 of record, in folio 77, he says: "I read what was in the contract." On page 40, folio 83 of record, he says in answer to the question, "The papers were read over, I suppose, after they were written and signed, in your presence?" Ans. "Yes, sir; I gave the notes and paid over the money

that I was to pay in money; that was on the 23rd day of May, 1874, the date of these notes. From that time on, Gillen & Monroe continued to cut timber and manufacture it into lumber and shingles at the mill aforesaid, as they had before." On page 36, folio 75 of record, he says in answer to question, "You were aware when you purchased this contract, took this assignment, that it was relative to the same property they had been working on for two or three years, and you had been handling a portion of the time the lumber and shingles for them. You now understand it is the same place?" A. "Yes, sir; I know nothing to the contrary." He even thought he owned the shingles because he got them of Gillen & Monroe, the owners, and were manufacturing them on the land in question, and further admits as one among other reasons that he bought the contract against Gillen & Monroe for the purpose of giving them further time and helping them along. And what he did not know at the time he commenced negotiations about the condition of Gillen & Monroe he sent for them and had an interview with one of them for the very purpose of getting posted, so that from the plaintiff in error's own showing there is nothing for this court to do to relieve said plaintiff in error but to hold that Judges Dyer and Drummond were wrong in holding that the supreme court of the state of Wisconsin was right in deciding that parol evidence could not be given to vary the written contract between the plaintiff and defendant and now under consideration in this case. Judge Dyer in his opinion (see record, page 74, folio 156,) gives a plain, unanswerable reason for holding that the supreme court of Wisconsin were right in their conclusions of law. He says: "As I have had occasion before to say, if this contract were nothing more than a mere assignment, if it were nothing more than an instrument which passed the title, if it contained no special clauses indicating that other matters about which the parties were contracting were embraced in the instrument, then it would be a case within the rule of Hahn vs. Doolittle, which was a case of a simple as-

signment passing the title to the note and mortgage which were transferred. But this instrument of assignment provides, among other things, that upon certain contingencies the plaintiff Hubbard shall convey a certain portion of this land. It declares that the assignment of the mortgages and contract are made upon a certain condition, to-wit: That the notes executed by Marshall to Hubbard shall be paid when they mature; further, that in case of default in the payment of the notes, this instrument shall be void and of no effect; and that the mortgages and contract shall be deposited in a certain place for safe-keeping. And, therefore, while the decision of the supreme court in the case of Hubbard vs. Marshall is not absolutely binding upon this court, yet I am persuaded that it expresses the law upon this question."

I do not deem it necessary to discuss the other evidence in the case as it does not bear on the only question in this case; and there are only two questions, as I view it, presented by counsel for plaintiff in error: First, does the answer of the plaintiff in error, by his pleadings and evidence, show any defence to the promissory notes given by Marshall to Hubbard, upon which judgment was rendered? Second, was Judge Dyer right in directing a verdict in favor of the defendant in error Hubbard against the plaintiff in error Marshall?

There seems to be nothing in this case to show that all the consideration for said notes was not fully set forth in the written agreement marked Exhibit No. 1 on page 66 of record; and Justice Cowen uses very sensible and forcible language. He says (Sec. 1420, Cowen's Treaties, 1858 edition): "It is the duty of courts to be astute and even ingenious in upholding all contracts so far as may be, in giving them effect according to the intent of the parties. So far as a written contract is clear, either in its particular words, or upon consideration of its legal effect, no evidence extraneous to the writing can be received to contradict, vary or explain its meaning."

Also see:—